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IN THE

Supreme Court of the United States

October Term, 1957

No. 621

WELDON BRUCE DAYTON,
Petitioner,

v.

JOHN FOSTER DULLES, individually and as Secretary of State of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Weldon Bruce Dayton respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on October 24, 1957, affirming a summary judgment of the United States District Court for the District of Columbia against petitioner in an action to declare petitioner's entitlement to a passport and to enjoin the Secretary of State from denying petitioner a passport.

Opinions Below

The opinions in the Court of Appeals (R. 291-303) have not yet been reported; they are reproduced in Appendix C, *infra*. The opinion of the District Court (R. 280-289) is reported at 146 F. Supp. 876.

Jurisdiction

The judgment of the Court of Appeals was entered on October 24, 1957 (R. 304; Appendix B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the denial of a passport to petitioner, a citizen of the United States, by the Secretary of State (hereinafter "the Secretary"), on the basis of information disclosed neither to petitioner nor to the courts, violates the due process clause of the Fifth Amendment.

2. Whether such passport denial on the stated criteria—that the Secretary has reason to believe that petitioner "is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement" and "because the issuance of a passport would be contrary to the national interest"—violates petitioner's rights to substantive due process under the Fifth Amendment.

3. Whether such passport denial is grounded on the doctrine of "guilt by association" and so violates petitioner's rights under the First and Fifth Amendments.

4. Whether such passport denial and the Secretary's passport regulations (22 C.F.R. 51.135-51.170; hereinafter "the Passport Regulations"), as applied to petitioner, abridge petitioner's First Amendment rights of speech, belief and association; constitute a bill of attainder and *ex post facto* legislation, in violation of Article I, section 9 of the Constitution; and unlawfully deprive petitioner of his rights of travel and to due process, in violation of the Fifth and Ninth Amendments to the Constitution.

5. Whether the Passport Regulations are invalid because they are not authorized by Congress and because they conflict with the Congressional intent in pertinent statutes, *viz.*, the Internal Security Act of 1950, § 6, 64

Stat. 987, 993, 50 U.S.C. 785; the Act of June 14, 1902, c. 1088, § 2, 32 Stat. 386, 22 U.S.C. 212; and the Expatriation Act of 1868, 15 Stat. 223, R.S. § 1999.

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions involved are Article I, sections 8(3) and 9(3); and the First, Fifth and Ninth Amendments to the Constitution. The statutes involved are the Act of July 3, 1926, c. 772, § 1, 44 Stat. 887, 22 U.S.C. 211a; the Act of June 14, 1902, c. 1088, § 2, 32 Stat. 386, 22 U.S.C. 212; the Immigration and Nationality Act of 1952, § 215, 66 Stat. 163, 190, 8 U.S.C. 1185; the Internal Security Act of 1950, § 6, 64 Stat. 987, 993, 50 U.S.C. 785; and the Expatriation Act of 1868, 15 Stat. 223, R.S. § 1999. The statutory provisions are set forth in Appendix A, *infra*, pp. 22-24. The pertinent provisions of the Passport Regulations (22 C.F.R. 51.135-51.170) are set forth in Appendix A, *infra*, pp. 24-32.

Statement of the Case

On March 5, 1954, petitioner, a native-born citizen of the United States and a physicist by education and training, filed an application for a passport to enable him to travel to Bombay, India, there to accept a position offered as research physicist at the Tata Institute of Fundamental Research (R. 6, 12, 24-28, 70-72).

On April 14, 1954, the Director of the Passport Office advised that the passport application was being denied because the Department of State "feels that it would be contrary to the best interest of the United States to provide you passport facilities at this time" (R. 10). Thereupon, petitioner conferred with an officer of the Passport Office; fully responded to his numerous inquiries; and, upon the latter's request, executed a detailed affidavit, containing a full statement of the mat-

ters about which inquiry had been made (R. 6, 10-42). In that affidavit, petitioner averred, *inter alia*, as follows (R. 12):

> "I am not now and I have never been a member of the Communist Party.
>
> "With the possible exception of a casual and brief association with the work of the Joint Anti-Fascist Refugee Committee for a few months in 1941 and in 1942 (all as related below); I am not now and never have been a member of any of the organizations designated on the Attorney General's list (which I have carefully examined).
>
> "I am not now engaged and I have never engaged in any activities which, so far as I know or at any time knew, support or supported the Communist movement.
>
> "I wish to go abroad for the sole purpose of engaging in experimental research in physics at the Tata Institute of Fundamental Research in Bombay. I am not going abroad to engage in any activities which, so far as I know or can imagine, will in any way advance the Communist movement."

On June 24, 1954, the Director of the Passport Office advised that "in view of certain factors of . . . [petitioner's] case which I am not at liberty to discuss with him, the Department must adhere to its previous decision that it would be contrary to the best interests of the United States to provide . . . passport facilities at this time" (R. 42-43). Some months thereafter, the Director notified petitioner that (R. 44):

> "In arriving at its decision to refuse passport facilities . . . , the Department took into consideration his connection with the Science for Victory Committee and his association at that time with various communists. However, the determining factor in the case was . . . [petitioner's] association with persons suspected of being part of the Rosenberg espionage ring, and his alleged presence at an apartment in New York which was allegedly used for microfilming material obtained for the use of a foreign government."

On November 8, 1954, in accordance with the Passport Regulations, petitioner filed a petition of appeal with the Board of Passport Appeals of the Department of State (R. 44-47). Responding only partially to petitioner's request for particulars (R. 45-47), that Board replied that the State Department's file (R. 49):

> " . . . contains information indicating that . . . [petitioner] was present at 65 Morton Street, New York City in the summer of 1949 (July or August) and at Apartment 61, 65 Morton Street, New York City, during the month of January 1950. The . . . [petitioner's] relationship, if any (past or present), with the following-named persons is considered pertinent to the Board's review and consideration of the case: Marcel Scherer, Rose Segure, Sandra Collins, Frank Collins, Bernard Peters, Kurt Fritz, Karl Sitte, Louis S. Weiss, Alfred Sarant, and William Perl."

Hearings were subsequently held before a panel of the Board, at which testimony of petitioner and witnesses called by him and by the State Department [1] was adduced and documentary evidence received (R. 58-270).

On September 7, 1955, the Acting Secretary of State advised petitioner that the Board had submitted its recommendation to the Secretary and that, after "a review of the entire record and on the basis of all the evidence, including that contained in confidential reports of investigation", the Secretary had denied petitioner's passport application "under Section 51.135 of the Passport Regulations" (R. 4-5).

Petitioner thereupon filed a complaint in the District Court, requesting (1) a judgment declaring that he was entitled to a passport and that the Passport Regulations

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[1] The testimony of the Department's witnesses was limited to a single aspect of the charges against petitioner: that he was present on several occasions in a New York apartment building (R. 171-270; see *infra*, pp. 7-8)

are unlawful, and (2) an injunction enjoining the Secretary from continuing to deny petitioner a passport and directing the Secretary forthwith to issue such a passport (R. 1-5). On appeal from the District Court's grant of summary judgment for the Secretary (R. 56-57), the Court of Appeals reversed and directed remand of the case to the Secretary for reconsideration in accordance with the rules laid down in the Court's prior decision in *Boudin* v. *Dulles*, 98 U.S. App. D.C. 205, 235 F.2d 532. *Dayton* v. *Dulles*, 99 U.S. App. D.C. 47, 237 F.2d 43.

On October 4, 1956, after reconsideration, the Secretary signed a document designated "Decision and Findings" (R. 275-278), denying petitioner's passport application "under Section 51.135(c) of the Passport Regulations[2] . . . *and* because the issuance of a passport would be contrary to the national interest" (R. 278; emphasis supplied). The Secretary's findings, based, in part, on evidence in the open record and, in part, on undisclosed information allegedly in the State Department files, were grouped in four categories, as follows (R. 276-277):

> 1a. On the basis of the open record: Petitioner was active in the Science for Victory Committee while at the University of California during 1943-1944, serving as chairman during much of that period. As chairman, he associated with Frank and Sandra Collins and Rose Segure, who had been instrumental in organizing the Committee.
>
> b. Confidential information in the State Department files "indicates" that the Committee "was conceived and organized by Communist Party officials as a front for propaganda and espionage activities; and that Frank and Sandra Collins and Rose Segure were members of the Communist Party at the time of their association" with petitioner and the Committee.
>
> [The Secretary does not find or suggest that petitioner had any knowledge of the Communist origin,

[2] Section 51.135(c) of the Passport Regulations is set forth at Appendix A, *infra*, p. 25.

if such there was, of the Science for Victory Committee or of the Communist membership of the three persons named. To the contrary, petitioner's undisputed testimony is that, to his knowledge, the Committee had no relationship whatever with the Communist Party (R. 83) and that none of the persons named or any others active in the organization were Communist Party members (R. 79-81, 92-93).]

2a. On the basis of the open record: During the period 1946-1950, at Ithaca, New York, petitioner maintained a close association and relationship with Alfred Sarant. At petitioner's invitation, Sarant and his wife lived in petitioner's house for a period of eight months in 1947-48, pending completion of the Sarant home next door; and, thereafter, petitioner and Sarant were neighbors until July, 1950. In July, 1950, Sarant became the subject of intensive interrogation by the F.B.I. About a week thereafter, Sarant left Ithaca and subsequently entered Mexico with petitioner's then wife.

b. Confidential information in State Department files "establishes" that Sarant "was an active member of the Communist Party; that he admitted said membership during the years 1943 and 1944; and that he was involved in the espionage apparatus of Julius Rosenberg".

[Again, the Secretary neither finds nor suggests that petitioner had any knowledge of Sarant's membership in the Communist Party or involvement with Rosenberg. To the contrary, petitioner's undisputed testimony is that he never knew Sarant to be engaged in Communist or espionage activities (R. 154-155).]

3a. On the basis of the open record: Petitioner was present "during 1949 and 1950, on more than one occasion, in the apartment building at 65 Morton Street, New York City, in which Alfred Sarant was lessee of apartment 6-I".

b. Confidential information in State Department files "indicates" that Sarant's New York City apartment "was used by Julius Rosenberg and other members of his spy ring for the microfilming of classified United States Government documents which were ultimately transferred to a foreign power."

[Petitioner has repeatedly and consistently denied—to F.B.I. agents, in affidavits filed with the Government, and in sworn testimony before grand juries and in the State Department—that he has ever set foot in the Morton Street apartment building (except on one occasion, in June, 1951, when he accompanied F.B.I. agents, at their request, to that address) (R. 32, 103, 133-134, 269-270). The Secretary does not find or suggest that petitioner had any knowledge of the uses to which the Sarant apartment in that building was allegedly put.]

4a. On the basis of the open record: Since 1938, petitioner has maintained a close association and relationship with Bernard Peters, who was responsible for petitioner's offer of employment at the Tata Institute in Bombay, where petitioner desires to work in close collaboration with Peters.

b. Confidential information in State Department files "indicates" that Peters "has held membership in the Communist Party outside the United States; has engaged in numerous Communist activities both in this country and abroad; and is suspected of being a Communist espionage agent."

[The Secretary neither finds nor suggests that petitioner knew of Peters' membership in the Communist Party or Communist activities, if such there were. To the contrary, petitioner's testimony was that, based on their long and close friendship, he was convinced that Dr. Peters was not a Communist (R. 16, 80, 150, 151).]

From the foregoing findings, "together with the confidential information relating thereto, *as well as other confidential information contained in the files of the Department of State* . . .", the Secretary concluded that he had "reason to believe, on the balance of all the evidence, that . . . [petitioner] is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and willfully of advancing that movement" (R. 278; emphasis supplied). The Secretary stated that the confidential information relating to the four enumerated findings "relates to the internal security of the

United States" and that disclosure of its sources and details would "be detrimental to our national interest by compromising investigating sources and methods and seriously interfering with the ability of this Department and the Executive Branch to obtain reliable information affecting our internal security . . . [and] would have an adverse affect upon our ability to obtain and utilize information from sources abroad and interfere with our established relationships in the security and intelligence area" (*ibid.*). Disclosure of the other confidential information relied on, the Secretary said, "might . . . prejudice the interest of United States foreign relations" (*ibid.*).

On resubmission of the case to the District Court, a summary judgment was again granted for the Secretary (R. 289-290; see R. 280-289; *Dayton* v. *Dulles*, 146 F. Supp. 876). On appeal, a division of the Court of Appeals, Judge Fahy dissenting, affirmed the judgment of the District Court (R. 304).

The majority of two judges below held that the grounds stated by the Secretary for the passport denial were sufficient to support such denial and that his reliance on undisclosed information in reaching his decision was lawful; the majority concluding, as follows (Appendix C, *infra*, p. 11): ". . . the problem is whether disclosure would adversely affect our internal security or the conduct of our foreign affairs. The cases and common sense hold that the Courts cannot compel the Secretary to disclose information guarded by him in confidence in this area. If he need not disclose the information he has, the only other course is for the courts to accept his assertion that disclosure would be detrimental in fields of highest importance entrusted to his exclusive care. We think we must follow that course."

Judge Fahy, dissenting, was of the opinion that the Secretary's "decisional basis" for the passport denial was "too broad when the particular national interest is not

broken down to come within the governing criteria" enunciated by Judge Fahy in his dissent in *Briehl* v. *Dulles*, —— U.S. App. D.C. ——, — F.2d —, June 27, 1957; that is, whether the passport denial was necessary "to prevent the reasonable likelihood of harm to our national defense or to the conduct of our foreign affairs" (Appendix C, *infra*, pp. 11-13). Absent such specification by the Secretary, Judge Fahy was of the view that the Passport Regulations must be held to "lack all validity under present legislation" (*id.* p. 12).

Reasons for Granting the Writ

The Secretary of State has here barred an American citizen from travelling to another nation of the free world, there to advance his chosen profession. This the Secretary has done by application of one of the substantive standards recently prescribed in his Passport Regulations. Thus, there are presented the very issues posed by *Kent and Briehl* v. *Dulles*, No. 481, this Term (pending on petition for writ of certiorari), whose importance, the Government agrees, demands an authoritative adjudication by this Court.[3]

Beyond this, our case directly and inescapably involves special and important questions merely implicit in *Kent and Briehl*. There, the passport applicants had refused to execute affidavits as to past and present membership

[3] In *Kent and Briehl* v. *Dulles*, *supra*, the Solicitor General has not opposed the granting of certiorari, "in the light of the continuing importance of the issues presented and of the diversity of views of particular aspects of these questions expressed in the courts below" (Memorandum for Respondent). In a recent press conference, the Secretary himself spoke of the urgency of a ruling by this Court: ". . . the whole legal area as regards passports is somewhat in doubt, and there are pending a number of cases in the courts which, if they go up to the Supreme Court, will probably lead to some authoritative decision as to just what the functions and responsibilities of the Secretary of State are as regards passports . . ." (The New York Times, May 15, 1957, p. 10).

in the Communist Party; and passports were denied purportedly because of such refusal. Here, petitioner did execute such an affidavit, denying membership in the Communist Party at any time; and a passport was denied him, despite non-membership, because the Secretary concluded he had reason to believe petitioner was "going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and willfully of advancing that movement" *and* "because the issuance of a passport would be contrary to the national interest" (R. 278). These stated grounds for passport denial were at no point made more explicit or specific. Moreover, the Secretary's decision was based on confidential information disclosed neither to petitioner nor to the courts.

Consequently, whatever the Court's action in *Kent and Briehl, supra*, certiorari here is clearly warranted. For, whereas passports were denied in the earlier cases purportedly for procedural reasons and at the threshold of the administrative process; the denial in this case was based on the substantive standards of the Regulations and made after completion of the administrative proceedings: a requisite affidavit was executed, hearings were held, and findings and a determination were rendered by the Secretary. Review of this case would thus afford the Court an opportunity for that comprehensive consideration and definitive adjudication with respect to the passport policies and practices of the State Department, which, as the Government concedes, are most urgent.

The decision below squarely presents important questions of Federal law which have not been, but should be, settled by this Court; it conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester*, 227 F.2d 708; and, in our view, it reflects a misapplication of this Court's prior decisions and conflicts with other of the Court's applicable decisions.

1. In reaching the conclusions on which he bases this passport denial, the Secretary has admittedly relied, in vital part, on information, allegedly in State Department files, which he has refused to disclose either to petitioner or to the courts.[4] The majority below notes that this Court has never passed upon the precise question whether such reliance on undisclosed information to deny a citizen his right to travel abroad comports with due process (Appendix C, *infra*, pp. 5-6) and professedly shares with Americans their resentment and opposition to deprivation of liberty on the basis of undisclosed information (*id.*, p. 9). It feels compelled nevertheless to sanction so radical a course because of the "necessitous circumstances of public concern" (*ibid.*) and because the "cases and common sense hold that the courts cannot compel the Secretary to disclose information garnered by him in confidence in this area" (*id.*, p. 11).

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[4] The majority opinion below erroneously states that the Secretary disclosed the substance of this information to petitioner (Appendix C, *infra*, p. 9). This is not accurate. His "Findings and Decision" (R. 275-278) make it plain that he has relied on information whose nature and substance have *never* been disclosed.

The Secretary does purport to furnish the gist of the confidential information related to Findings I-IV (R. 276-277). There, he tells us what the confidential information "indicates" or (in Finding II) "establishes". In no instance does he supply the details or sources of the information. Nor are we advised to what extent the secret reports are derived from secret informants, whose names and veracity the Secretary admittedly himself sometimes does not know (see the stipulation in *Kamen* v. *Dulles*, D.D.C., C.A. No. 1121-55, dated June 6, 1955, which appears in Sen. Comm. on Judiciary, Subc. on Constit. Rts., 84th Cong., 1st sess., Hrgs. Nov. 15-16, 1955, pp. 92-93; and see, also, par. 4 of the affidavit of John Foster Dulles, dated Jan. 11, 1956, in *Boudin* v. *Dulles*, C.A.D.C., No. 13031).

With respect to Finding V of his Decision (R. 275), equally essential to the decision of passport denial, the Secretary, however, furnishes not even the gist of the confidential information to which he refers. Not even the slightest indication of what that information may be appears in the record.

a. The decisions on which the majority relies certainly do not support their holding. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304; and *Chicago and Southern Airlines* v. *Waterman S.S. Corp.*, 333 U.S. 103, concern the Executive's exercise of its foreign affairs functions. But, as the court below recognizes, "The issuance of a passport is not the conduct of foreign affairs" (Appendix C, *infra*, p. 10). Moreover, these and similar decisions, to the extent they sustain the Executive's reliance on undisclosed information, do so only insofar as such information is utilized for legislative or quasi-legislative determinations. They "do not involve individualized fact finding and classification, but legislative determinations [and] political judgments . . . ". *Gonzales* v. *United States*, 348 U.S. 407, 412, fn. 4; and see Davis, *The Requirement of a Trial Type Hearing*, 70 Harv. L. Rev. 193 (1956).

We are not here confronted with the use of secret information in connection with promulgation of regulations of general application, such as a bar to travel of *all* citizens to a particular geographical area, a function assimilable to the legislative process. Rather, we have confidential information here used in a particular factual adjudication relating to one individual citizen. Other research physicists presumably remain free to travel to India; petitioner alone is prohibited from doing so. And this because the Secretary has made findings and conclusions concerning petitioner *himself*; which characterize, stigmatize and adjudge him *alone* an individual bent on Communist activity abroad.

Resorting to secret information to brand a citizen ineligible for a passport and thus to impair his liberty of travel is plainly in violation of due process. *Morgan* v. *United States*, 304 U.S. 1, 18; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 302-304; *Lloyd Sabaudo S.A.* v. *Elting*, 287 U.S. 329, 335-336; *United States* v. *Abilene & S.R. Co.*, 265 U.S. 274, 288-

289.[5] Moreover, in this case, "in view of the stigma attached" to petitioner by the Secretary's findings and decision of passport denial, "the need for procedural safeguards seems even greater than in other cases". *Cole* v. *Young*, 351 U.S. 536, 546.

The majority below also invokes "common sense" in support of its holding (Appendix C, *infra*, p. 11). We submit, however, that the American mores would seem rather to dictate that no citizen be stigmatized, accused and shorn of his liberty on secret information and the *ipse dixit* of a Federal officer. As the President has put it: "In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose." (Statement of President Eisenhower, Nov. 23, 1953, quoted in *Jay* v. *Boyd*, 351 U.S. 345, 374 (Douglas, J., dissenting).) We assume that a public officer is subject to at least the same code of conduct as is a private citizen. "Confrontation and cross-examination under oath are essential, if the American ideal under due process is to remain a vital force in our public life . . ." *Peters* v. *Hobby*, 349 U.S. 331, at 351 (Douglas, J., concurring).

b. The decision below is in direct conflict with that of the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester*, 227 F.2d 708. *Parker* concerned the rights of a seaman applying for a specially validated Coast Guard merchant mariner's document needed to enable him to

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[5] These decisions affecting property rights will be liberally applied to cases involving the personal liberty of movement. Cf. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206; see *Jencks* v. *United States*, 353 U.S. 657; *Peters* v. *Hobby*, 349 U.S. 331, 351-352 (Douglas, J., concurring); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 180 (Douglas, J., concurring); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 551 (Jackson, J., dissenting).

follow his calling; the instant case involves the rights of a citizen applying for a passport necessary so that he may pursue his vocation at a scientific institution in India.[6] The Ninth Circuit Court of Appeals struck down the Coast Guard regulations because they permitted reliance by the Coast Guard on data concealed from the seaman affected; because they consequently denied to the seamen their right of cross-examination; and because they contemplated decisions denying merchant mariner's documents on records containing facts unknown to the seamen and which they were unable to refute. Invalidating these screening regulations as a violation of due process, the Court held that "this system of secret informers, whisperers and tale bearers [is not] of such vital importance to the public welfare that it must be preserved at the cost of denying to the citizen even a modicum of the protection traditionally associated with due process" (227 F. 2d at 719-720).[7] See also, Judge Youngdahl's opinion in *Boudin* v. *Dulles*, 136 F. Supp. 218, modified 98 U.S. App. D.C. 205, 235 F. 2d 532.

These questions, squarely presented here, are plainly of such importance as to require an authoritative ruling by this Court.

2. This case also lays bare the utter ambiguity of the criteria which the Passport Regulations recently, and for the first time in our history, imposed for passport issuance.

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[6] That the two cases are counterparts is demonstrated by the provision in the State Department's regulations which exempts the travel of any seaman from the requirement of a passport if he possesses a "specially validated United States merchant mariner's document issued by the Coast Guard", the very document of clearance involved in *Parker*. 22 C.F.R. 53.3(c), as amended 22 F.R. 9215.

[7] The Government did not seek certiorari in the *Parker* case. It apparently has accepted the decision of the Circuit Court of Appeals; for it has revised its regulations to comport with the Court's ruling and has granted clearances to the seamen affected.

Petitioner's avowed purpose for travel abroad is to go to India, there to accept an appointment offered him as research physicist at the Tata Institute for Fundamental Research. The Secretary quite properly accepts petitioner's statement of purpose (R. 277). Nonetheless, he denies the passport application because he has "reason to believe, on the balance of all the evidence, that . . . [petitioner] is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement" and "because the issuance of a passport would be contrary to the national interest" (R. 278). There is neither specification of the activities in which the Secretary believes petitioner will engage; nor explanation of the manner in which such activities abroad, whatever they may be, will advance the Communist movement or affect the national interest.

This blatant ambiguity in the "decisional basis" of the Secretary led Judge Fahy to dissent from the decision below and to remark that, if the substantive criteria of the Passport Regulations are thus to be applied, one must conclude, as Judge Bazelon did in his dissent in *Briehl* v. *Dulles*, *supra*, that the Regulations lack "all validity under present legislation" (Appendix C, *infra*, pp. 12-13).

The standard applied to bar petitioner from travel (section 51.135 (c) of the Passport Regulations) is hopelessly vague. Who can define with any certainty the term "Communist movement"? Who can know what is meant by "advancement of the Communist movement"? Cf. *Watkins* v. *United States*, —— U.S. ——, 77 S.Ct. 1173, 1187, 1193; *Sweezy* v. *State of New Hampshire*, —— U.S. ——, 77 S.Ct. 1203, 1209-1210. The vagueness is compounded by use of the term "on the balance of all the evidence", since such "evidence" was never entirely revealed to petitioner, even as it is not revealed to any passport applicant. Equally ambiguous is the Secre-

tary's reference to "the national interest", which he says precludes the issuance of a passport to petitioner.

Such criteria afford no possibly meaningful guide for a citizen who wishes to maintain his liberty of travel or to regain such liberty once the Secretary has withdrawn it. Under such a formula, no one can possibly know what conduct on his part will render him ineligible for passport facilities.

The standards applied in this case consequently violate "the first essential of due process of law". *Connally* v. *General Construction Co.*, 269 U.S. 385, 391; *Small* v. *American Sugar Refining Co.*, 267 U.S. 233, 238-240; see *Jencks* v. *United States*, 353 U.S. 657, 678 (Burton, J., concurring); *United States* v. *Hautau*, 43 F.Supp. 507 (D.N.J.). Such ambiguous criteria for government action are censurable and must be stricken particularly where, as here, First Amendment rights are involved. *Burstyn* v. *Wilson*, 343 U.S. 495; *Winters* v. *New York*, 333 U.S. 507; *Niemotko* v. *Maryland*, 340 U.S. 268; *Kunz* v. *New York*, 340 U.S. 290.

The Secretary's reliance on standards so ambiguous and undefined and the perfunctory manner in which the majority below accepted them squarely raise additional important questions which require consideration and adjudication by this Court.

3. The Secretary's action here violates due process for the further reason that it posits the passport denial not on petitioner's own activities, or knowledge, or state of mind; but instead on his innocent association with persons whose activities the Secretary finds culpable. Such indifference to *scienter* is irreconcilable with the statement of the majority of the lower court in its *Briehl* opinion (slip op., p. 21): ". . . as we read the regulations, they refer to knowing associations with Communism". Clearly, the decision below in this case violates this Court's strictures in *Wieman* v. *Updegraff*, 344 U.S.

183; *Schware* v. *Board of Examiners,* 353 U.S. 232, 246; and *Konigsberg* v. *State Bar of California,* 353 U.S. 252, and reflects a glaring application of the doctrine of "guilt by association".

Insofar as it is disclosed, the basis for the Secretary's decision of passport denial is (1) petitioner's activity in a Science for Victory Committee and association with its organizers in 1943-44; (2) his close association and relationship with Alfred Sarant in Ithaca, New York, during 1946-1950; (3) his presence in a New York apartment building in which Sarant had an apartment, during 1949 and 1950; and (4) his continuing close association with Bernard Peters, since 1938 (R. 276-277). The Secretary tells us that confidential information in State Department files "indicates" or "establishes" that this one organization and these named persons were, in one fashion or another, to a lesser or greater degree, involved in Communist Party affairs or in espionage. Whether or not such confidential information does in fact exist, whether or not it is reliable, whether or not it "indicates" or "establishes" what the Secretary says it does; there is, as we have already indicated, not the slightest suggestion either (1) that petitioner ever knew or had reason to know of these alleged wrongful activities of his associates, or (2) that he himself was ever a member of the Communist Party, or (3) that he himself at any point or to any degree ever engaged in any of the culpable activities referred to. Indeed, the evidence of record is all to the contrary (See *supra,* pp. 6-8).

Thus, the Secretary's findings, even if we accept them as true, are not a rational basis for concluding that petitioner was going abroad, in 1956, for the purpose of engaging in activities to advance the Communist movement; or that the issuance of a passport to him would in any way impair our national interest. The findings assume relevance only as they afford a basis for imputing to petitioner, notwithstanding his complete innocence and

lack of knowledge, the misconduct ascribed to his associates. The Secretary's decision of passport denial, which the majority below sustains, thus necessarily constitutes a flagrant application of the heinous doctrine of "guilt by association", a doctrine alien to our traditions and constitutional principles and "one of the most odious institutions of history". *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 178 (Douglas, J., concurring). Here is an example of that "[i]ndiscriminate classification of innocent with knowing activity [which] must fall as an assertion of arbitrary power". *Wieman* v. *Updegraff*, *supra*, 344 U.S. at 191; see, also, *Schware* v. *Board of Bar Examiners*, *supra*, and *Konigsberg* v. *State Bar of California*, *supra*.

4. In addition to these special questions, this case, as we have already noted (*supra*, p. 10), also presents the issues involved in *Kent and Briehl* v. *Dulles*, *supra*. A statement of those issues and the importance of their adjudication appears in the petition for a writ of certiorari filed in the *Kent and Briehl* case. There is no need for repetition here. In summary, those issues are, as follows:

a. Are the Passport Regulations and the decision of passport denial here valid in light of their abridgement of petitioner's First Amendment rights? Within the framework of the instant case, it is impossible to reconcile the Secretary's action with such rights of petitioner. As Judge Fahy points out, there is nothing in this record to demonstrate why a bar on petitioner's travel abroad is necessary "to prevent the reasonable likelihood of harm to our national defense or to the conduct of our foreign affairs" (Appendix C, *infra*, pp. 12-13). The Secretary's belief that petitioner's activities will "advance the Communist movement" certainly does not subsume a claim that such activities will in any sense be unlawful or outside the protection of the First Amendment; there is

no reason to imply such a charge. Indeed, the Secretary finds (R. 277) that petitioner wishes to go abroad, as he has stated, to engage in research at the Tata Institute in Bombay; the record discloses no other purpose.

b. Is the passport denial, insofar as the Secretary's decision is grounded on petitioner's past conduct and associations antedating the promulgation of the Passport Regulations, valid in light of the inhibitions against bills of attainder and retroactive penal legislation enunciated in Article I, section 9 of the Constitution? See *Ex parte Garland*, 71 U.S. 333; *Cummings* v. *Missouri*, 71 U.S. 277.

c. Do the Passport Regulations exceed the statutory authority vested in the Secretary and are they in conflict with the Congressional intent expressed in pertinent legislation? If the Regulations are to be sustained, as the majority below would sustain them, by reliance on the provisions of 22 U.S.C. 211a and 8 U.S.C. 1185, serious constitutional problems arise; for neither of those statutes supplies any standards for the Secretary's substantive classification of citizens for passport issuance, and it is doubtful whether Congress could delegate such power of classification to the Executive branch without providing standards.

d. Is the absence of Congressional authorization, if such there is, cured by resort to so-called inherent powers of the President in foreign affairs and national security?

CONCLUSION

Although we are concerned here particularly with only one individual citizen, a physicist who desires to travel abroad in the interests of his professional advancement, the Passport Regulations and their application affect also the 700,000 citizens who annually apply to the State Department for passports. These Regulations represent the first effort by a Federal officer to establish a code of con-

duct by which a citizen's eligibility to travel abroad is to be judged. The Regulations have led to widespread criticism and concern [8] and to considerable litigation in the courts of the District of Columbia. The issues presented by this case are of vital importance to all citizens and to a proper administration of the Government's passport policy. They are unusual, complex and far-reaching issues, of a statutory, constitutional and practical nature, which have never before been adjudicated by this Court.

Because of these considerations and for the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Washington 5, D. C.
Attorney for Petitioner

November, 1957

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[8] See, for example: Parker, *The Right to Go Abroad: To Have and to Hold a Passport*, 40 Virginia L.R. 853 (1954); Barnett, *Passport Administration and the Courts*, 32 Oregon L.R. 193 (1953); Wyzanski, *Freedom to Travel*, Atlantic Monthly, October, 1952; Doman, *A Comparative Analysis: Do Citizens Have the Right to Travel*, 43 A.B.A.J. 307 (1957); Jaffe, *The Right to Travel*, etc., 35 For. Affairs 18 (1956); Editorials: Chicago Daily Sun Times, November 26, 1955; New York Times, May 4, 1956; Denver Post, May 27, 1956; Washington Post, October 27, 1957.

Perhaps the most eminent critic of these passport policies is the former Secretary of State who himself promulgated the regulations of 1952; he characterizes them as "a grave mistake and a failure to foresee consequences which were inevitable." Acheson, *A Democrat Looks at His Party* (1955), p. 127.

The increasing concern of distinguished commentators is exemplified by such writings as O'Brian, *National Security and Individual Freedom* (1955), pp. 39, 48; Chafee, *Three Human Rights in the Constitution* (1956), pp. 162-214; Gellhorn, *Individual Freedom and Governmental Restraints* (1956), p. 15; Cushman, *Civil Liberties in the United States* (1956), pp. 113-116.

APPENDIX A

1. The pertinent sections of Title 22 of the United States Code are as follows:

> § 211a. *Authority to grant, issue, and verify passports.*—The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls, when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.
>
> § 212. *Who entitled to passport.*—No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.

2. Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U. S. C. 1185, as codified, is as follows in pertinent part:

> § 1185. Travel control of citizens and aliens during war or national emergency—Restrictions and prohibitions on aliens.
>
> (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—
>
> (1) [There follow restrictions enumerated (1) through (7) not here pertinent.]
>
> * * * *

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

3. Title I, § 6 of the Internal Security Act of 1950, 64 Stat. 987, 993, 50 U. S. C. 785, as codified, is as follows:

(a) When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

(c) As used in this section, the term "member" shall not include any individual whose name has not been made public because of the prohibition contained in section 9 (b) of this title.

4. The Expatriation Act of 1868, 15 Stat. 223, R.S. § 1999 is as follows:

Right of expatriation

Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation is declared inconsistent with the fundamental principles of the Republic.

5. The pertinent portions of the Regulations of the Secretary of State, as found in Title 22 of the Code of Federal Regulations, are as follows:

(a) Part 51 of Title 22, 1955 Supplement:

"§ 51.135. *Limitations on issuance of passports to persons supporting Communist movement.*—In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Community [sic] party;

(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant

the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement:

(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement.

§ 51.136.* *Limitations on Issuance of passports to certain other persons.* In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (1) violate the laws of the United States; (2) be prejudicial to the orderly conduct of foreign relations; or (3) otherwise be prejudicial to the interests of the United States.

§ 51.137. *Notification to persons whose passport application is tentatively disapproved.*—A person whose passport application is tentatively disapproved under the provisions of § 51.135 or § 51.136 will be notified in writing of the tentative refusal, and of

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* The provisions of Section 51.136 are here set forth as amended by the Secretary of State, 21 F. R. 336, January 18, 1956. These amendments have not yet been reflected in the Supplement to the Code of Federal Regulations. Prior to that date § 51.136 read as follows:

"§ 51.136 *Limitations on Issuance of Passports to Persons Likely to Violate Laws of the United States.* In order to promote the national interest by assuring that the conduct of foreign relations shall be free from unlawful interference, no passport, except one limited for direct and immediate return to the United States, shall be issued to persons as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities while abroad which would violate the laws of the United States, or which if carried on in the United States would violate such laws designed to protect the security of the United States."

the reasons on which it is based, as specifically as in the judgment of the Department of State security considerations permit. He shall be entitled, upon request, and before such refusal becomes final, to present his case and all relevant information informally to the Passport Division. He shall be entitled to appear in person before a hearing officer of the Passport Division, and to be represented by counsel. He will, upon request, confirm his oral statements in an affidavit for the record. After the applicant has presented his case, the Passport Division will review the record, and after consultation with other interested offices, advise the applicant of the decision. If the decision is adverse, such advice will be in writing and shall state the reasons on which the decision is based as specifically as within the judgment of the Department of State security limitations permit. Such advice shall also inform the applicant of his right to appeal under § 51.138.

§ 51.138. *Appeal by passport applicant.*—In the event of a decision adverse to the applicant, he shall be entitled to appeal his case to the Board of Passport Appeals provided for in § 51.139.

§ 51.139. *Creation and functions of Board of Passport Appeals.*—There is hereby established within the Department of State a Board of Passport Appeals, hereinafter referred to as the Board, composed of not less than three officers of the Department to be designated by the Secretary of State. The Board shall act on all appeals under § 51.138. The Board shall adopt and make public its own rules of procedure, to be approved by the Secretary, which shall provide that its duties in any case may be performed by a panel of not less than three members acting by majority determination. The rules shall accord applicant the right to a hearing and to be represented by counsel, and shall accord applicant and each witness the right to inspect the transcript of his own testimony.

§ 51.140. *Duty of Board to advise Secretary of State on action for disposition of appealed cases.*—It shall be the duty of the Board, on all the evidence,

to advise the Secretary of the action it finds necessary and proper to the disposition of cases appealed to it, and to this end the Board may first call for clarification of the record, further investigation, or other action consistent with its duties.

§ 51.141. *Bases for findings of fact by Board.*—(a) In making or reviewing findings of fact, the Board, and all others with responsibility for so doing under §§ 51.135 to 51.143, shall be convinced by a preponderance of the evidence, as would a trial court in a civil case.

(b) Consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line will suffice, prima facie, to support a finding under § 51.135(b).

§ 51.142. *Oath or affirmation by applicant as to membership in Communist Party.*—At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.

§ 51.143.* *Applicability of Sections 51.137-51.142.* Except for action taken by reason of noncitizenship

* The provisions of Section 51.143 are here set forth as amended by the Secretary of State, 21 F. R. 336, January 18, 1956. These amendments have not yet been reflected in the Supplement to the Code of Federal Regulations. Prior to that date, § 51.143 read as follows:

"§ 51.143 *Applicability of Sections 51.135-51.142.* When the standards set out in § 51.135 or § 51.136 are made relevant by the facts of a particular case to the exercise of the discretion of the Secretary under § 51.75, the standards in §§ 51.135 and 51.136 shall be applied and the procedural safeguards of §§ 51.137-51.142 shall be followed in any case where the person affected takes issue with the action of the Department in granting, refusing, restricting, withdrawing, cancelling, revoking, extending, renewing, or in any other fashion or degree affecting the ability of a person to use a passport through action taken in a particular case."

of geographical limitations of general applicability necessitated by foreign policy considerations, the provisions of §§ 51.137-51.142 shall apply in any case where the person affected takes issue with the action of the Secretary in granting, refusing, restricting, withdrawing, canceling, revoking, extending, renewing or in any other fashion or degree affecting the ability of such person to receive or use a passport.

RULES OF THE BOARD OF PASSPORT APPEALS

§ 51.151. *Organization of Board.*—The Secretary of State shall appoint a Board of Passport Appeals consisting of three or more members, one of whom shall be designated by the Secretary as Chairman. The Chairman shall assure that there is assigned to hear the appeal of any applicant a panel of not less than three members including himself or his designee as presiding officer, which number shall constitute a quorum.

§ 51.152. *Decisions of the Board.*—Decisions shall be by majority vote. Voting may be either in open or closed session on any question except recommendations under § 51.140, which shall be in closed session. Decisions under § 51.140 shall be in writing and shall be signed by all participating members of the Board.

§ 51.153. *Counsel to the Board.*—A Counsel, to be designated by the Secretary of State, shall be responsible to the Board for the scheduling and presentation of cases, aid in legal and procedural matters, information to the applicant as to his procedural rights before the Board, maintenance of records and such other duties as the Board or the Chairman, on its behalf, may determine.

§ 51.154. *Examiner.*—The Board may, within its discretion, appoint an examiner in any case, who may, with respect to such case, be vested with any or all authority vested in the Board or its presiding officer, subject to review and final decision by the Board, but, an applicant shall not be denied an opportunity for a hearing before the Board unless he expressly waives it.

§ 51.155. *Chairman.*—The Chairman, or his designee, shall preside at all hearings of the Board, and shall be empowered in all respects to regulate the course of the hearings and pass upon all issues relating thereto. The Chairman, or his designee, shall be empowered to administer oaths and affirmations.

§ 51.156. *Prior administrative remedies.*—It is required that prior to petitioning for an appeal, an applicant shall (a) exhaust the administrative remedies available in the Passport Office, as set out in § 51.137, and (b) comply with the provisions of § 51.142, as a part of his application, if deemed necessary by the Passport Office.

§ 51.157 *Petition.*—An applicant desiring to take an appeal shall, within thirty calendar days after receipt of the advice of adverse decision by the Passport Office file with the Board a written petition under oath or affirmation which shall, in plain and concise language, refute or explain the reasons stated by the Passport Office for its decision.

§ 51.158 *Delivery of papers.*—Petitions or other papers for the attention of the Board may be delivered personally, by registered mail, or by leaving a copy at the offices of the Board at the address to be stated in the advice of adverse action furnished applicant by the Passport Office.

§ 51.159 *Notice of hearing.*—Applicant shall receive not less than five calendar days notice in writing of the scheduled date and place of hearing which shall be set for a time as soon as possible after receipt by the Board of applicant's petition.

§ 51.160 *Appearance.*—Any party to any proceedings before the Board may appear in person, or by or with his attorney, who must possess the requisite qualifications, as hereinafter set forth, to practice before the Board.

§ 51.161 *Applicant's attorney.*—(a) Attorneys at law in good standing who are admitted to practice before the Federal courts or before the courts of any State or Territory of the United States may practice before the Board.

(b) No officer or employee of the Department of State whose official duties have, in fact, included participation in the investigation, preparation, presentation, decision or review of cases of the class within the competence of the Board of Passport Appeals shall, within two (2) years after the termination of such duties appear as attorney in behalf of an applicant in any case of such nature, nor shall any one appear as such attorney in a case of such class if in the course of prior government service he has dealt with any aspects of the applicant's activities relevant to a determination of that case.

§ 51.162 *Supplementary information to applicant.*—The purpose of the hearing is to permit applicant to present all information relevant and material to the decision in his case. Applicant may, at the time of filing his petition, address a request in writing to the Board for such additional information or explanation as may be necessary to the preparation of his case. In conformity with the relevant laws and regulations, the Board shall pass promptly and finally upon all such requests and shall advise applicant of its decision. The Board shall take whatever action it deems necessary to insure the applicant of a full and fair consideration of his case.

§ 51.163 *Hearings.*—The Passport file and any other pertinent Government files shall be considered as part of the evidence in each case without testimony or other formality as to admissibility. Such files may not be examined by the applicant, except the applicant may examine his application or any paper which he has submitted in connection with his application or appeal. The applicant may appear and testify in his own behalf, be represented by counsel subject to the provisions of § 51.161, present witnesses and offer other evidence in his own behalf. The applicant and all witnesses may be cross-examined by any member of the Board or its counsel. If any witness whom the applicant wishes to call is unable to appear personally, the Board may, in its discretion, accept an affidavit by him or order evidence to be taken by deposition. Such depositions may be taken before any person designated by the Board

and such designee is hereby authorized to administer oaths or affirmations for the purpose of the depositions. The Board shall conduct the hearing proceedings in such manner as to protect from disclosure information affecting the national security or tending to disclose or compromise investigative sources or methods.

§ 51.164 *Admissibility.*—The Board and the applicant may introduce such evidence as the Board deems proper. Formal rules of evidence shall not apply, but reasonable restrictions shall be imposed as to the relevancy, competency, and materiality of evidence presented to the Passport Office's stated reasons for its decision and or to the application of § 51.135 or § 51.136 to applicant's case.

§ 51.165 *Argumentation.*—All argumentation shall be directed to the application of the passport regulations to the facts of the particular case. The Board will permit no oral argument or motions relative to the legality or propriety of the hearing or other procedures of the Board. Submission of such argument or motions will be confined to the filing of written briefs, objections, or motions to be made a part of the record. The Board will not undertake to consider any such motion or contention.

§ 51.166 *Privacy of hearings.*—Hearing shall be private. There shall be present at the hearing only the members of the Board, Board's Counsel, official stenographers, Departmental employees concerned, the applicant, his counsel, and the witnesses. Witnesses shall be present at the hearing only while actually giving testimony.

§ 51.167 *Misbehavior before Board.*—If, in the course of a hearing before the Board, an applicant or attorney is guilty of misbehavior, he may be excluded from further participation in the hearing. In addition, he may be excluded from participation in any other case before the Board.

§ 51.168. *Transcript of hearings.*—A complete verbatim stenographic transcript shall be made of hearings by qualified reporters, and the transcript shall constitute a permanent part of the record.

Upon request, the applicant and each witness shall have the right to inspect the transcript of his own testimony.

§ 51.169. *Notice of decision.*—The Board shall communicate the action recommended under § 51.140 on all cases appealed to it, to the Secretary of State. The decision of the Secretary of State shall be notified in writing to the applicant. Such notice shall be given the applicant as promptly as possible after his hearing before the Board.

§ 51.170. *Probative value of evidence.*—In determinnng whether there is a preponderance of evidence supporting the denial of a passport the Board shall consider the entire record, including the transcript of the hearing and such confidential information as it may have in its possession. The Board shall take into consideration the inability of the applicant to meet information of which he has not been advised, specifically or in detail, or to attack the creditability of confidential informants.

(b) Part 53 of Title 22 (as am'd. 22 F.R. 9216):

§ 53.2 *Limitations upon travel.*—No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States . . . , unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in § 53.3.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,717

WELDON BRUCE DAYTON,
Appellant,

v.

JOHN FOSTER DULLES, SECRETARY OF STATE,
Appellee.

October Term, 1957.

C.A. 4890-55

United States Court of Appeals for the District of Columbia Circuit

Filed Oct. 24, 1957

JOSEPH W. STEWART, *Clerk*

Appeal from the United States District Court for the District of Columbia.

Before: Prettyman, Wilbur K. Miller, and Fahy, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: Oct. 24, 1957.

Per Circuit Judge Prettyman.

Separate dissenting opinion by Circuit Judge Fahy.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13717

WELDON BRUCE DAYTON, APPELLANT

v.

JOHN FOSTER DULLES, Secretary of State, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided October 24, 1957

Mr. Harry I. Rand for appellant.

Mr. B. Jenkins Middleton, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Mr. Oliver Gasch*, United States Attorney, and *Mr. Paul A. Sweeney*, Attorney, Department of Justice, were on the brief, for appellee.

Mr. Nathan H. David filed a brief on behalf of the Federation of American Scientists, as *amicus curiae*, urging reversal.

Before PRETTYMAN, WILBUR K. MILLER, and FAHY, Circuit Judges.

PRETTYMAN, *Circuit Judge:* This controversy concerns an application for a passport. It is now here upon a second appeal. Upon the first appeal[1] we applied the

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[1] Dayton v. Dulles, 99 U.S. App. D.C. 47, 237 F.2d 13 (1956).

rule we had laid down in the *Boudin* case[2] and remanded. The Secretary had rested his denial of the passport upon Section 51.135 of his Regulations[3] but without specification or findings sufficient to identify the subsection within which he classified Dayton. We held he must make such findings if his denial of the passport was to be sustained. Quoting from *Boudin* we further said that if the Secretary relied upon confidential information he must explain with such particularity as the circumstances permitted the nature of the reasons why this information might not be disclosed.

Upon the remand the Secretary rendered a Decision and Findings and again denied the passport. Upon representation the District Court granted the Secretary's motion for summary judgment and dismissed the complaint.[4] This appeal followed.

The decision and findings of the Secretary were divided into six sections. Each of the first four sections dealt with a specific activity of Dayton. They were similar in format. The first section, for example, dealt with his activity in a Science for Victory Committee and his association with two named persons in that organization. The Secretary found, on the open record, that this activity and association existed. Then he found, on the basis of confidential information in the files of the Department, that this Committee had been organized by Communist Party officials as a front for propaganda and espionage activities and that the named persons were Communist Party members. In the second section of his findings the Secretary dealt in precisely similar fashion with Dayton's association and relationship with another named person, "an active member of the Communist Party • • • in

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[2] Boudin v. Dulles, 98 U.S. App. D.C. 305, 235 F.2d 532 (1956).

[3] 22 C.F.R. § 51.135 (Supp. 1956).

[4] Dayton v. Dulles, 146 F.Supp. 876 (1956).

volved in the espionage apparatus of Julius Rosenberg." In the third section he recited his finding that Dayton was present on more than one occasion in the apartment building in which was the apartment used by Rosenberg "and other members of his spy ring for the microfilming of classified United States Government documents which were ultimately transferred to a foreign power." In the fourth section the Secretary found "a close association and relationship" with a person who "has engaged in numerous Communist activities both in this country and abroad; and is suspected of being a Communist espionage agent."

In Section V of his findings the Secretary said:

> "I have reason to believe, on the balance of all the evidence, that the applicant is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement. I have reached this conclusion on the basis of the foregoing findings together with the confidential information contained in the files of the Department of State, the disclosure of which might prejudice the conduct of United States foreign relations."

Section VI of the findings is:

> "The confidential information referred to in paragraphs I(b), II(b), III(b) and IV(b) above relates to the internal security of the United States. The substance of this confidential information was disclosed to the applicant during the consideration of his passport application. To disclose publicly the sources and details of this information would, in my judgment, be detrimental to our national interest by compromising investigative sources and methods and seriously interfering with the ability of this Department and the Executive Branch to obtain reliable information affecting our internal security. Moreover, it would have an adverse effect upon our ability to obtain and utilize information from sources abroad and interfere with our established relationships in the

security and intelligence area; and might, with respect to information referred to in paragraph V, prejudice the interest of the United States foreign relations."

The conclusion of the Secretary was:

"The passport application of Weldon Bruce Dayton is therefore denied under Section 51.135(c) of the Passport Regulations (22 CFR 51.135(c)), and because the issuance of a passport would be contrary to the national interest."

The validity of the Regulations of the Secretary in respect to passports has been upheld by us in *Briehl* v. *Dulles*, decided June 27, 1957.[5] In the present case the Secretary conformed strictly to the requirements laid down by us in *Boudin* v. *Dulles* and upon the original appeal in this case. He made findings and identified the precise provision of the Regulations within which he found Dayton.[6] He said the substance of the confidential information relied on in Sections I, II, III and IV had been disclosed to Dayton.

The Secretary stated, clearly and succinctly, that he denied the passport because he had reason to believe, partly from the open record and partly from confidential information, that Dayton was going abroad to engage in activities which would advance the Communist movement. The issuance of the passport, said the Secretary, would be contrary to the national interest. Further the Secretary stated, also clearly and succinctly, his confidential information relates to the internal security of the United States and to disclose it would be detrimental to the

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[5] —— U.S. App. D.C. ——, —— F.2d ——.

[6] Section 51.135(c): "Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement."

national interest in respect to internal security and might prejudice our foreign relations.

Thus the case falls into two parts. The first question is whether the grounds stated by the Secretary are sufficient to support the denial of the passport. If it be true that Dayton was going abroad knowingly and wilfully to advance the Communist movement, could the Secretary refuse him a passport? That question was answered fully in *Briehl*. We there held he could refuse upon that ground.

It is true that the Secretary did not here say in specific terms that he denied the passport because to grant it would be detrimental to internal security or foreign relations. But surely, after all that has been said and done about the Communist movement by this Government, described by us in *Briehl*, it is obvious that the advance of that movement is detrimental to the internal security of this country and to its foreign relations. Clearly, when the Secretary, having made the finding as to Dayton's purpose, said that issuance of the passport would be contrary to the public interest, he meant the public interest in internal security and in foreign affairs. In the context of the record as it now is, in the light of the finding as to Dayton's purpose, "national interest" clearly means "internal security and foreign affairs". Any difference in meaning between those terms is of no moment here.

The second question is whether the Secretary could base his conclusion in this matter partly upon confidential information. Even if the ground for denial is valid, is the denial valid if the evidence which establishes the ground is confidential? The Secretary stated, as we have pointed out, that disclosure of this information would be detrimental to the national interest in respect to internal security and the conduct of our foreign affairs. Our view is that upon that basis he need not disclose the information but he may act upon it.

The Supreme Court has not passed upon the precise question here before us, *i.e.*, the permissible reliance upon

confidential information in a passport case. But we find helpful guideposts in the principles laid down by the Court in different fields. The right to engage in business and the right to enter into contracts are parts of the liberty protected by the Fifth and Fourteenth Amendments. No person can be deprived of those rights except by due process of law. The guiding principle in respect to them is well set out in the *West Coast Hotel* case.[7] There the Court had before it a minimum wage act. The attack was that the statute was a deprivation of freedom of contract, a part of the liberty protected by due process of law. "The principle which must control our decision is not in doubt," the Court said. "Liberty under the Constitution is thus necessarily subject to the restraints of due process, and *regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.*"[8] (Italics supplied.) Quoting from its own opinion in *Chicago, B. & Quincy R.R. Co.* v. *McGuire*,[9] and referring to the freedom of contract, the Court said, "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."[10] The Court upheld a limitation upon the freedom of contract, upon the ground that community interest required protection of the health of women and of a relatively helpless class of workers.

In respect to contracts in foreign trade and doing business abroad, the Court has consistently held that the right can be denied by the President upon the basis of confidential information, that he need not disclose that

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[7] West Coast Hotel Co. v. Parrish, 300 U.S. 379, 81 L.Ed. 703, 57 S.Ct. 578 (1937).

[8] *Id.*, 300 U.S. at 391.

[9] 219 U.S. 549, 567, 55 L.Ed. 328, 31 S.Ct. 259 (1911).

[10] *Supra* note 7, 300 U.S. at 392.

information, and that the courts have no authority to inquire into it. In *United States* v. *Curtiss-Wright Corp.*[11] the Court had to determine the validity of a Joint Resolution which forbade the sale of munitions of war to persons in certain countries whenever the President proclaimed that the prohibition of such sales might contribute to the reestablishment of peace. The Court discussed at some length the use of confidential information in such matters.[12] It decided that embargo is within the area of foreign affairs, or at least may well affect foreign relations, and may well depend upon confidential information. The Court referred[13] to several earlier congressional resolutions authorizing the President to prohibit the exportation of coal and other materials. In *Panama Refining Co.* v. *Ryan*[14] the Court had described the executive power of embargo as "cognate to" the conduct of foreign relations. In a more recent case[15] the Court considered an order which denied a certificate for overseas air transportation. The order recommended by the Civil Aeronautics Board was changed by the President and then approved by him, pursuant to the statute. But the reasons for the changes were not disclosed beyond a statement that "because of certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility, he has reached conclusions which require" changes in the Board's opinion. The question was whether the courts could review such a determination by the President. The

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[11] 299 U.S. 304, 81 L.Ed. 255, 57 S.Ct. 216 (1936).

[12] *Id.*, 299 U.S. at 319-322.

[13] *Id.* at 325-327.

[14] 293 U.S. 388, 422, 79 L.Ed. 446, 55 S.Ct. 241 (1935).

[15] Chicago & Southern Air Lines v. Waterman Corp., 333 U.S. 103, 92 L.Ed. 568, 68 S.Ct. 431 (1948).

Supreme Court held they could not. The Court said:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."[16]

Thus the Court held that due process is not violated if the right to do business abroad is denied upon the basis of confidential information pertaining to foreign affairs.

Those cases involved commerce, more readily subject to regulation, or deprivation, than are the inherent rights of individuals. We do not suggest that the scope of due process in respect to commerce is the same as it is in respect to such other rights. But we think the principles laid down by the Court in the commerce cases for determining the extent of necessary due process are of assistance in testing the nature of the process necessary to the deprivation of an individual right such as the right to travel abroad.

We turn to the problem before us. The right to travel is a part of liberty. A person can be deprived of it only

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[16] *Id.*, 333 U.S. at 111.

by due process of law. A regulation of a liberty, reasonable in relation to its subject and adopted in the interest of the community, is due process. Travel abroad by some people for some purposes may under some circumstances involve our foreign relations or our national security. Travel abroad to advance the Communist movement is obviously, on its face, "cognate to" or may well affect our foreign affairs and our national security. Obviously a determination that a certain person wants to go abroad for the purpose of advancing the Communist movement may depend upon information gleaned from diplomatic or consular sources or from other sources abroad important to our well-being. Determinations made by Executive officials upon such information have traditionally, and by virtue of constitutional provisions relating thereto, been lodged in the Executive, and the confidence in which he has received that information has never been violated or even questioned by the legislative or judicial branches of the Government. We have before us a determination by the Secretary of State, based upon confidential information derived from sources available to him in the course of the performance of his duties, that a certain person intends to go abroad to advance the Communist movement. The Secretary disclosed to the person the substance of this confidential information. Upon the reasoning indicated in the foregoing paragraphs we conclude that this procedure satisfies the requirements of due process in such a matter. The community interest makes it necessary that this be so. The right to travel abroad may be denied upon that basis.

Americans always resent and oppose the deprivation of liberty upon the basis of undisclosed information. We do so in this area. We would not agree to it except in necessitous circumstances of public concern. Such circumstances are here.

In *Shachtman* v. *Dulles*[17] we emphasized that the

[17] 96 U.S. App. D.C. 287, 225 F.2d 938 (1955).

Government may not arbitrarily deny a passport and that the question is one of substantive due process. In doing so we cautioned:

> "What is arbitrary, however, in the sense of constituting a denial of due process, depends upon circumstances. [Citing cases.] Restraint upon travel abroad might be reasonable during an emergency though in normal times it would be arbitrary. World conditions, and those in particular areas, as to which the Executive has special information and on the basis of which he is especially qualified to make decisions, bear upon the question. For reasons thus suggested the issuance of passports throughout our history has been left to the judgment of the Secretary of State under Presidential regulation, and is subject only to constitutional safeguards. And even these must be defined with cautious regard for the responsibility of the Executive in the conduct of foreign affairs." [18]

And we further cautioned:

> "We must not confuse the problem of appellant's application for a passport with the conduct of foreign affairs in the political sense, which is entirely removed from judicial competence. For even though his application might be said to come within the scope of foreign affairs in a broad sense, it is also within the scope of the due process clause, which is concerned with the liberty of the individual free of arbitrary administrative restraint. There must be some reconcilation of these interests where only the right of a particular individual to travel is involved and not a question of foreign affairs on a political level." [19]

We adhere to those views. The issuance of a passport is not the conduct of foreign affairs. The Secretary does not have unfettered discretion in respect to it—nor does

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[18] *Id.*, 96 U.S. App. D.C. at 290-291, 225 F.2d at 941-942.

[19] *Id.*, 96 U.S. App. D.C. at 293, 225 F.2d at 944.

he claim it. His regulations specify the persons to whom he will not issue passports and indicate the reasons for such rules. They contemplate factual conclusions after opportunity is afforded the applicant for hearing. All this the Secretary has done. We have found his substantive regulations valid, and he has meticulously complied with ther The other question—not the grounds upon which the passport was denied but the evidence which established the grounds—is a different question. There the problem is whether disclosure would adversely affect our internal security or the conduct of our foreign affairs. The cases and common sense hold that the courts cannot compel the Secretary to disclose information garnered by him in confidence in this area. If he need not disclose the information he has, the only other course is for the courts to accept his assertion that disclosure would be detrimental in fields of highest importance entrusted to his exclusive care. We think we must follow that course.

The judgment of the District Court is

Affirmed.

FAHY, *Circuit Judge, dissenting:* In the developing law growing out of litigation due to the fact that denial of a passport has the effect at this time of depriving a person of a right to travel he otherwise would have, *Shachtman* v. *Dulles*, 96 U.S. App. D.C. 287, 225 F.2d 938, I think this case requires still further consideration by the Secretary. In dissenting in *Briehl* v. *Dulles*, —— U.S. App. D.C. ——, I gave my reasons for the view that the Secretary has power to deny a passport though the applicant has the basic qualification of being a person who owes allegiance to the United States.[1] But I could

[1] I assumed that such an applicant also complied with the Regulations having to do with identity and other more or less formal or administrative matters.

find no greater power, either inherent in the Executive or delegated by the Congress, than to deny the passport when necessary "to prevent the reasonable likelihood of harm to our national defense or to the conduct of our foreign affairs." And in all cases of denial procedural due process is required. Unless the authority is held within these bounds it seems to me the alternative is to say, as Judge Bazelon has said in his dissent in *Briehl*, that regulations embodying such substantive criteria as have been before us in recent passport cases lack all validity under present legislation.

I am convinced that the Congress has attempted foreign-travel control of individuals, and has not merely contemplated quarantining, as it were, certain areas. For example, 8 U.S.C. § 1185(b) (1952)[2] restricts the right of any citizen to "enter" as well as to "depart from . . . the United States" when "the United States is at war or during the existence of any national emergency proclaimed by the President." This attempted control should not be judicially nullified if it can be reasonably sustained consistently with the Constitution. As I said in my *Briehl* dissent, I think it reasonable to construe the Congressional exertion of control, together with the Executive authority in the area of foreign affairs, to extend to such control as is exercised, consistently with procedural due process, within the criteria stated in my *Briehl* dissent, but no further under existing law.

In the present case the findings of the Secretary and the Regulations applied by him were not framed within those criteria. I realize the weight of Judge Prettyman's opinion that the Secretary's action under section 51.135 (c) of the Regulations, and his reference to "the national interest," can be construed to bring the denial within the criteria to which I have referred, but it seems to me we should not be left thus to interpret the decisional basis

[2] 66 Stat. 190 (1952).

when the Secretary has not himself expressed it in terms of the authority he possesses. A finding that the denial is in the "national interest" is too broad when the particular national interest is not broken down to come within the governing criteria. The finding that appellant's travel would lead to activities knowingly engaged in to advance the Communist movement is subsidiary to the basic finding framed in terms of the "national interest." In other words, in denying this passport the issuing authority has not focused upon the question whether the grant would be likely to cause harm to national defense or to the conduct of foreign affairs. This is no doubt due to the fact that under the Regulations applied to this case the Secretary has not felt limited to the criteria which I think should govern his action.

While the court should not order the passport to be issued, I think the basis for the denial now before us is not within the terms of the authority available under existing law While my position, if it prevailed, would entail further delay this seems to me unavoidable in the process of working out legal solutions to the problems involved.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 621

WELDON BRUCE DAYTON, *Petitioner*

v.

JOHN FOSTER DULLES, individually and as Secretary of State of the United States

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1957

No. 621

WELDON BRUCE DAYTON, *Petitioner*

v.

JOHN FOSTER DULLES, individually and as Secretary of State of the United States

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

Opinions Below

The opinions in the Court of Appeals have not yet been reported; they appear at R. 291-302. The opinion of the District Court (R. 280-289) is reported at 146 F.Supp. 876.

Jurisdiction

The judgment of the Court of Appeals was entered on October 24, 1957 (R. 303). The petition for certiorari was filed on November 21, 1957, and granted on January 6, 1958 (R. 304). The jurisdiction of the Court rests on 28 U.S.C. 1254(1).

Statutes and Regulations Involved

Section 51.135 of the Passport Regulations * (22 C.F.R. 51.135) reads, as follows:

> § 51.135. *Limitations on issuance of passports to persons supporting Communist movement.*—In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:
>
> (a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party;
>
> (b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;
>
> (c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement.

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* We use the term "Passport Regulations" to refer to those regulations of the Secretary of State titled "Passports" and codified at 22 C.F.R. 51.135-51.170. Other of the Secretary's regulations titled "Travel Control of Citizens and Nationals in Time of War or National Emergency" and codified at 22 C.F.R. 53.1-53.7 are also relevant. Pertinent provisions of these latter are set forth in the Appendix, *infra*, pp. 84 *seq.*

The other sections of the Passport Regulations and other pertinent regulatory provisions are set forth in the Appendix, *infra*, pp. 77 *seq*.

The statutes involved are the Act of July 3, 1926, c. 772, § 1, 44 Stat. (Pt. 2) 887, 22 U.S.C. 211a; the Immigration and Nationality Act of 1952, § 215(a), 66 Stat. 190, 8 U.S.C. 1185; the Internal Security Act of 1950, Tit. I, § 6, 64 Stat. 993, 50 U.S.C. 785; the Act of July 27, 1868 (Expatriation Act of 1868), 15 Stat. 223, R.S. § 1999; and the Administrative Procedure Act, §§ 5(b), (c), 7(c), (d), 8(b), 10(e), 60 Stat. 239, 241, 242, 243, 5 U.S.C. 1004(b), (c), 1006(c), (d), 1007(b), 1009(e). The pertinent provisions of these statutes are set forth in the Appendix, *infra*, pp. 72-77.

Questions Presented

1. Whether the denial of a passport to petitioner, a citizen of the United States, by the Secretary of State, on the basis of information disclosed neither to petitioner nor to the courts, violates the due process clause of the Fifth Amendment.

2. Whether the proceeding in the State Department was governed by the formal requirements of the Administrative Procedure Act; and, if so, whether it complied with those requirements.[1]

3. Whether the passport denial, on the stated criteria —that the Secretary has reason to believe that petitioner "is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement" and "because the issuance of a passport would be contrary to the national

[1] This question was not set forth in the petition for certiorari. It is presented and briefed here because, in our opinion, it reflects "a plain error" in the decision below (Rule 40(d)(2), S.Ct. Rules).

interest"—violates petitioner's rights to due process under the Fifth Amendment.

4. Whether that passport denial lacks any rational basis and is grounded on the doctrine of "guilt by association", in violation of petitioner's rights under the First and Fifth Amendments.

5. Whether that passport denial and the Passport Regulations, as applied to petitioner, abridge petitioner's First Amendment right of free association; violate Article I, section 9 of the Constitution; and unlawfully deprive petitioner of his rights of travel and to due process, in violation of the Fifth and Ninth Amendments to the Constitution.

6. Whether the Passport Regulations are invalid because they are not authorized by Congress and because they conflict with the Congressional intent reflected in other legislation.

Statement of the Case

Petitioner, thirty-nine years old, is a native-born citizen of the United States, the descendant of early settlers in colonial America. He is a physicist by education and training, having at various times been employed as physicist and teacher by the University of California, the Department of the Navy (in a degaussing project), the Office of Scientific Research and Development (in a rocket project), Cornell University, and Massachusetts Institute of Technology. (R. 12-13, 24-28, 35-40, 70-71).

On March 5, 1954, petitioner filed an application for a passport to enable him to travel to Bombay, India, there to accept a position as research physicist at the Tata Institute of Fundamental Research (R. 6).[2]

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[2] The Tata Institute is a recognized post-graduate institute affiliated with the University of Bombay. *World of Learning*, 484 (London, 1957); *Universities of the World Outside the United States*, 530 (1950). It is recognized as one of the world's leading

On April 14, 1954, the Director of the Passport Office advised petitioner that his passport application was being denied because the Department of State "feels that it would be contrary to the best interest of the United States to provide you passport facilities at this time" (R. 10). Thereupon, petitioner conferred with an officer of the Passport Office; fully responded to his numerous inquiries; and, upon his request, executed a detailed affidavit containing a full statement of the matters about which inquiry had been made (R. 6, 10-42). In that affidavit, petitioner averred, *inter alia,* as follows (R. 12):

> "I am not now and I have never been a member of the Communist Party.
>
> "With the possible exception of a casual and brief association with the work of the Joint Anti-Fascist Refugee Committee for a few months in 1941 and in 1942 (all as related below); I am not now and never have been a member of any of the organizations designated on the Attorney General's list (which I have carefully examined).
>
> "I am not now engaged and I have never engaged in any activities which, so far as I know or at any time knew, support or supported the Communist movement.
>
> "I wish to go abroad for the sole purpose of engaging in experimental research in physics at the Tata Institute of Fundamental Research in Bombay. I am not going abroad to engage in any activities which, so far as I know or can imagine, will in any way advance the Communist movement."

On June 24, 1954, the Director of the Passport Office advised that "in view of certain factors of . . . [petitioner's] case which I am not at liberty to discuss with him, the Department must adhere to its previous decision that it would be contrary to the best interests of the

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centers of cosmic-ray research. Its head, Dr. Homi J. Bhabha, is one of the world's most distinguished theoretical physicists and was president of the International Conference on the Peaceful Uses of Atomic Energy, held in Geneva, Switzerland, in August, 1955.

United States to provide . . . passport facilities at this time" (R. 42-43). Some months thereafter, the Director notified petitioner that (R. 44):

> "In arriving at its decision to refuse passport facilities . . ., the Department took into consideration his connection with the Science for Victory Committee and his association at that time with various communists. However, the determining factor in the case was . . . [petitioner's] association with persons suspected of being part of the Rosenberg espionage ring and his alleged presence at an apartment in New York which was allegedly used for microfilming material obtained for the use of a foreign government."

On November 8, 1954, in accordance with the Passport Regulations, petitioner filed a petition of appeal with the Board of Passport Appeals of the Department of State (R. 7, 44-46). In response to a request for particulars, filed by petitioner, pursuant to the Board's rules, to enable him to prepare his case (R. 45-47), the Board responded that it was barred by regulation from disclosing most of the information requested (R. 48) and advised only that the State Department's file (R. 49):

> ". . . contains information indicating that . . . [petitioner] was present at 65 Morton Street, New York City in the summer of 1949 (July or August) and at Apartment 61, 65 Morton Street, New York City, during the month of January 1950. The . . . [petitioner's] relationship, if any, (past or present), with the following-named persons is considered pertinent to the Board's review and consideration of the case: Marcel Scherer, Rose Segure, Sandra Collins, Frank Collins, Bernard Peters, Kurt Fritz, Karl Sitte, Louis S. Weiss, Alfred Sarant, and William Perl."

Hearings were subsequently held, before a panel of the Board, at which testimony of petitioner and witnesses called by him and by the State Department [3] was adduced

[3] The testimony of the Department's witnesses (R. 171-270) was limited to a single aspect of the charges against petitioner: that he was present in the New York apartment building (R. 54).

and documentary evidence received (R. 58-270). At the commencement of these hearings, despite petitioner's protests, the Board announced that, in reaching its determination, it would consider "a confidential file composed of investigative reports from Government agencies", which it refused to disclose to petitioner (R. 66; see R. 60-69, 165-166).

No report or recommendation of the Board of Passport Appeals was at any time furnished to petitioner; nor was he accorded an opportunity to present his case to the Secretary. On September 7, 1955, the Acting Secretary of State advised him that the Board had submitted its recommendation to the Secretary and that, after "a review of the entire record and on the basis of all the evidence, including that contained in confidential reports of investigation", the Secretary had denied petitioner's passport application "under Section 51.135 of the passport regulations" (R. 4-5).

Petitioner thereupon filed a complaint in the District Court for the District of Columbia against the Secretary, requesting (1) a judgment declaring that petitioner was entitled to a passport and that the Passport Regulations are unlawful, and (2) an injunction enjoining the Secretary from continuing to deny petitioner a passport and directing the Secretary forthwith to issue one to him (R. 1-5). The Secretary's answer did not deny the essential facts alleged in the complaint (R. 49-51). On cross-motions for summary judgment and supporting affidavits (R. 5-48; R. 51-56), the District Court entered summary judgment for the Secretary (R. 56-57). Petitioner thereupon appealed to the Court of Appeals (R. 57), which reversed the judgment of the District Court and directed remand of the case to the Secretary for reconsideration in accordance with the rules previously enunciated in the Court of Appeals' decision in *Boudin* v. *Dulles*, 235 F.2d 532. *Dayton* v. *Dulles*, 237 F.2d 43.

On October 4, 1956, without further hearing, the Secretary signed a document designated "Decision and Findings" (R. 275-278), denying petitioner's passport application "under Section 51.135(c) of the Passport Regulations . . . and because the issuance of a passport would be contrary to the national interest" (R. 278). In this document, the Secretary set forth four findings based on evidence in the open record and, in connection with each, referred to related confidential information allegedly in State Department files, as follows (R. 276-277):

> 1a. On the basis of the open record: Petitioner was active in the Science for Victory Committee while at the University of California during 1943-1944, serving as chairman during much of that period. As chairman, he associated with Frank and Sandra Collins and Rose Segure, who had been instrumental in organizing the Committee.
>
> b. Confidential information in the State Department files "indicates" that the Committee "was conceived and organized by Communist Party officials as a front for propaganda and espionage activities; and that Frank and Sandra Collins and Rose Segure were members of the Communist Party at the time of their association" with petitioner and the Committee.
>
> [The Secretary did not find or suggest that petitioner had any knowledge of the Communist origin, if such there was, of the Science for Victory Committee or of the Communist Party membership of the three persons named. To the contrary, petitioner's undisputed testimony was that, to his knowledge, the Committee had no relationship whatever with the Communist Party (R. 82-83) and that none of the persons named or any others active in the organization were Communist Party members (R. 79-81, 92-93).]
>
> 2a. On the basis of the open record: During the period 1946-1950, at Ithaca, New York, petitioner maintained a close association and relationship with Alfred Sarant. At petitioner's invitation, Sarant and his wife lived in petitioner's house for a period of eight months in 1947-48, pending completion of the

Sarant home next door; and, thereafter, petitioner and Sarant were neighbors until July, 1950. In July, 1950, Sarant became the subject of intensive interrogation by the F.B.I. About a week thereafter, Sarant left Ithaca and subsequently entered Mexico with petitioner's then wife.

b. Confidential information in State Department files "establishes" that Sarant "was an active member of the Communist Party; that he admitted said membership during the years 1943 and 1944; and that he was involved in the espionage apparatus of Julius Rosenberg."

[Again, the Secretary neither found nor suggested that petitioner had any knowledge of Sarant's membership in the Communist Party or involvement with Rosenberg. To the contrary, petitioner's undisputed testimony was that he never knew Sarant to be engaged in Communist or espionage activities. (R. 154-155).]

3a. On the basis of the open record: Petitioner was present "during 1949 and 1950, on more than one occasion, in the apartment building at 65 Morton Street, New York City, in which Alfred Sarant was lessee of apartment 6-I".

b. Confidential information in State Department files "indicates" that Sarant's New York City apartment "was used by Julius Rosenberg and other members of his spy ring for the microfilming of classified United States Government documents which were ultimately transferred to a foreign power."

[Petitioner repeatedly and consistently denied—to F.B.I. agents, in affidavits filed with the Government, and in sworn testimony before grand juries and in the State Department—that he had ever set foot in the Morton Street apartment building (except on one occasion, in June, 1951, when he had accompanied F.B.I. agents, at their request, to that address) (R. 32, 103, 133-134, 269-270). The Secretary did not find or suggest that petitioner had any knowledge of the uses to which the Sarant apartment in that building was allegedly put.]

4a. On the basis of the open record: Since 1938, petitioner has maintained a close association and relationship with Bernard Peters, who was responsible

for petitioner's offer of employment at the Tata Institute in Bombay, where petitioner desires to work in close collaboration with Peters.

b. Confidential information in State Department files "indicates" that Peters "has held membership in the Communist Party outside the United States; has engaged in numerous Communist activities both in this country and abroad; and is suspected of being a Communist espionage agent."

[The Secretary neither found nor suggested that petitioner knew of Dr. Peters' membership in the Communist Party or Communist activities, if such there were. To the contrary, petitioner's testimony was that, based on their long and close friendship, he was convinced that Dr. Peters was not a Communist (R. 16, 80, 150, 151).]

From the foregoing findings, "together with the confidential information relating thereto, *as well as other confidential information contained in the files of the Department of State* . . .", the Secretary concluded that he had "reason to believe, on the balance of all the evidence, that . . . [petitioner] is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement" and that "the issuance of a passport would be contrary to the national interest" (R. 278; emphasis supplied). The Secretary stated that the confidential information germane to the four enumerated findings "related to the internal security of the United States" and that disclosure of its sources and details would "be detrimental to our national interest by compromising investigative sources and methods and seriously interfering with the ability of this Department and the Executive Branch to obtain reliable information affecting our internal security . . . [and] would have an adverse effect upon our ability to obtain and utilize information from sources abroad and interfere with our established relationships in the security and intelligence area" *(ibid.)*. Disclosure of the other confidential information relied on, the Sec-

retary said, "might . . . prejudice the interest of United States foreign relations" *(ibid.)*.

On resubmission of the case to the District Court, again on cross-motions for summary judgment (R. 274-279; R. 280), that court again granted summary judgment for the Secretary (R. 289-290; for District Court's opinion, see R. 280-289; *Dayton* v. *Dulles*, 146 F.Supp. 876). On appeal, a division of the Court of Appeals, Judge Fahy dissenting, affirmed the summary judgment of the District Court (R. 303).

This Court granted certiorari (R. 304).

SUMMARY OF ARGUMENT

I.

Although the Constitution contains no express provision on the right of travel, there can be no question that freedom of movement is a fundamental attribute of personal liberty constitutionally protected against arbitrary Government restraint. Some fifty years ago, this principle was affirmed as to interstate travel in *Williams* v. *Fears*, 179 U.S. 270; and it has recently been consistently extended by the court below to travel abroad. Both history and policy considerations support this affirmation.

Since a passport by law is now a prerequisite to foreign travel (8 U.S.C. 1185; Presidential Proc. 3004, 67 Stat. c31), its denial is equivalent to denial of the right to travel abroad. *Shachtman* v. *Dulles*, 225 F.2d 938 (C.A.D.C.).

II.

The Secretary's decision of passport denial here was based in vital part on undisclosed information, neither the substance, details or sources of which have ever been disclosed to petitioner or to the courts. Thus, petitioner

has been deprived of the constitutional safeguard of a fair hearing. Such reliance on secret information violates due process.

There is no authority for governmental deprivation of personal liberties by resort to secret information. Those cases cited by the lower courts in which the use of such data has been sustained involved administrative determinations on issues of legislative facts; in our case, on the other hand, the Secretary has decided issues of adjudicative facts. Where individualized fact-finding and classification are involved, due process precludes reliance on undisclosed information.

Parker v. *Lester*, 227 F.2d 708 (C.A. 9) holds as much and is in direct conflict with the ruling below. *Parker* dealt with what, in effect, are seamen's passports. Despite the Government's appeal to security considerations, the court there struck down the Coast Guard screening regulations in issue because they permitted use of secret data to determine the eligibility of seamen for such passports.

A passport may be denied only after a due process hearing. Such a hearing contemplates, as a minimum, the rights of confrontation and cross-examination. A proceeding such as this one is tantamount to a criminal prosecution and, furthermore, stigmatizes the citizen-applicant as one disloyal to his Government. Consequently, his liberty and property are affected. The American mores dictate that no person be stigmatized, accused, and shorn of his liberty on undisclosed information and the *ipse dixit* of a Federal officer.

The appeal of the Secretary to security considerations, commonplace in loyalty and security proceedings, is neither unique to our time nor is it persuasive. The guarantees embodied in our Bill of Rights were designed to protect the individual against the same "reasons of

state". Moreover, there is no suggestion that the Secretary be compelled to reveal his secret files; disclosure is required only when he resorts to such files to deny an applicant his passport.

The balance of the conflicting interests involved on this issue is strongly in favor of disclosure. Whereas the injury to petitioner is severe, the prejudice which the Government foresees from disclosure is fanciful. The source of the information employed by the State Department in passport administration is that same vast melange of unreliable data that has been widely employed in Government employee security-risk programs. That the Department itself lacks confidence in the integrity of such information is evidenced by the history of several recent notorious cases and the instant case as well. Indeed, the Secretary has admitted that he himself at times does not know the identity and so cannot judge the veracity of his informants. Thus, he abdicates judgment to the F.B.I. and the other agencies from which he derives his anonymous information.

The war power does not support so radical a departure from traditional due process. The present emergency is not the equivalent of a shooting war. And Congress has never approved the standards or procedures for passport denial which the Secretary here applies.

III.

Although no statute expressly provides that passport adjudications by the Secretary "be determined on the record after opportunity for an agency hearing", 5 U.S.C. 1004, the Constitution requires a fair hearing before a passport may be denied. Accordingly, under the doctrine of *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, the formal requirements of the Administrative Procedure Act would appear to control. Nor is passport issuance a "foreign affairs function" excepted from the Act.

It is incontrovertible that, in several significant respects, the State Department proceeding here did not comply with the requirements of Administrative Procedure Act.

IV.

Even if we accept all the "facts" which the Secretary recites as true, and his conclusions as reasonable; the criteria on which he posits the passport denial here are so vague that they cannot satisfy due process requirements. The first standard, "advancement of the Communist movement", is no more meaningful than the epithets condemned in *Watkins* v. *United States*, 354 U.S. 178, and in other decisions of this and other courts. The second standard, "the national interest", is at least equally amorphous. In truth, this is no standard at all, but merely a cloak for the Secretary's claim of absolute discretion. Both these grounds, on which the Secretary bars petitioner from a passport, lack the reasonable certainty of due process criteria.

V.

The denial of a passport to petitioner violates due process because there is no rational basis for the Secretary's conclusions. We consider the four findings made from the open record and the undisclosed information deemed germane thereto; we assume their truth and accuracy. Nevertheless, they can afford no conceivably rational basis for the Secretary's conclusions. However ingeniously the Secretary may weave a "pattern of association" from (1) petitioner's brief affiliation with the Science for Victory Committee in 1943-1944, (2) an association with Sarant, from 1946 to 1950, (3) presence in a New York apartment building "on more than one occasion", in 1949 and 1950; and (4) friendship with Dr. Bernard Peters since 1938; such a "pattern of association", all quite innocent so far as petitioner was concerned,

cannot rationally lead to the conclusion that, in 1956, years later, petitioner's proposed trip to India was designed "to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully, of advancing that movement" and would be contrary to "the national interest".

The Secretary's findings assume relevance only insofar as they reflect a judgment of petitioner's guilt by association. Patently, that is what the Secretary's decision amounts to. Under our Constitution, such an official finding of vicarious guilt is impermissible and blatantly violates this Court's strictures with respect to the need for *scienter*.

VI.

The Secretary's decision of passport denial impairs petitioner's First Amendment rights. Petitioner is barred from travel solely by reason of his associations with others. The right to indulge in such associations, however, is protected from Government restraint by the First Amendment. Beyond this, the Secretary's action effects a prior restraint on all citizens, who must limit their freedom of association lest their right of travel be withdrawn. There is no showing of such danger of evil from petitioner's travel abroad as to warrant abridgements on First Amendment freedoms.

Furthermore, to apply the Passport Regulations as they have here been applied, is to do violence to the principles of fairness implicit in the inhibitions against bills of attainder and retroactive penal legislation embodied in Article I, section 9 of the Constitution. As in *Ex parte Garland*, 71 U.S. 333; and *Cummings* v. *Missouri*, 71 U.S. 277, the basis for depriving petitioner of a fundamental liberty is his past associations, and there is nothing he can do which would change the result.

VII.

The Secretary had no authority to issue the Passport Regulations, under which a passport was denied to petitioner in this case. On this Point, we adopt and respectfully refer the Court to Point II of the Argument in the Brief for Petitioners in *Kent and Briehl* v. *Dulles*, No. 481, this Term. A summary of the argument on this Point appears *infra*, pp. 66 *seq.*

ARGUMENT

I.

Petitioner's Right to Travel Abroad and Thus to a Passport, which is Presently Necessary for Such Travel, is Protected by the Constitution.

A. *Freedom to travel abroad is protected by the Constitution.*

Although the Constitution contains no express guarantee of the right of travel, either within the United States or abroad, there can be no question that such freedom of movement is a fundamental attribute of personal liberty which the Founders deemed constitutionally protected against arbitrary Government restraint.

At the turn of the century, speaking of travel among the States, this Court said, in *Williams* v. *Fears*, 179 U.S. 270, 274:

> "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty . . ."

Some fifty years later, in *Shachtman* v. *Dulles*, 225 F.2d 938, the Court of Appeals for the District of Columbia Circuit accorded the same rank to travel abroad, saying (at 941):

> "The right to travel, to go from place to place as the means of transportation permit, is a natural right

> subject to the rights of others and to reasonable regulation under law. A restraint imposed by the Government of the United States upon this liberty, therefore, must conform with the provision of the Fifth Amendment that 'No person shall be . . . deprived of . . . liberty . . . without due process of law.'"

Previously, a three-judge statutory court, in *Bauer* v. *Acheson*, 106 F.Supp. 445, 451 (D.D.C.) had reached the same conclusion. The right has since been consistently reaffirmed. *Boudin* v. *Dulles*, 235 F.2d 532; *Kraus* v. *Dulles*, 235 F.2d 840; *Dayton* v. *Dulles*, 237 F.2d 43; *Briehl* v. *Dulles*, 248 F.2d 561; *Stewart* v. *Dulles*, 248 F.2d 602; and see the opinion in the instant case, at R. 298. Both history and policy considerations support this affirmation.

The right of free movement is deeply rooted in Anglo-Saxon law. Demands for its guarantee were reflected as far back as the original (1215) Magna Carta, which granted every free man the right to leave the realm at his pleasure in time of peace; and it had become an established right in the common law by the seventeenth century. Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 Georgetown L.J. 63, 64-70 (1952); Parker, *The Right to Go Abroad: To Have and to Hold a Passport*, 40 Virginia L.R. 853, 866-868 (1954); Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 Yale L.J. 171, 190 (1952); Boudin, *The Constitutional Right to Travel*, 56 Columbia L.R. 46 (1956).

The right to travel was, of course, essential to the settlement of the American colonies, established by emigrants; and it early found expression in colonial charters, the Massachusetts Body of Liberties, the Constitution of the State of Pennsylvania and the Articles of Confederation. Chafee, *Three Human Rights in the Constitution* (1956), 171-175, 178, 184.

The importance of travel abroad to a free, democratic society hardly needs to be demonstrated. One's very liveli-

hood may depend upon it. See, e.g. *Boudin* v. *Dulles*, *supra*, 235 F.2d at 535, n.3; *Bauer* v. *Acheson*, *supra*, 106 F.Supp. at 451. Interdependence of the right to work and freedom of movement was noted in *Allgeyer* v. *Louisiana*, 165 U.S. 578, 589, where this Court stated that the term "liberty" in the Fourteenth Amendment includes

> ". . . the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; [and] to earn his livelihood by any lawful calling . . ."

Cf. *Crandall* v. *Nevada*, 73 U.S. 35, 44, and the concurring opinion of Mr. Justice Douglas in *Edwards* v. *California*, 314 U.S. 160, 180-181.

Affording, as it does, opportunities for the exchange of ideas and experiences, freedom of travel has been assimilated to the rights expressly guaranteed by the First Amendment: "In all these liberties the principal element is the stretching of the mind to accomodate the growing spirit". Wyzanski, *Freedom to Travel*, Atlantic Monthly, October 1952, p. 66. This is emphasized by the ever-growing need in our day, if knowledge is to be advanced, for the interchange of ideas among the world's scholars and scientists.[4] Particularly pertinent is President Eisenhower's statement, four years ago, underscoring the urgency for sending our teachers and students abroad (New York Times, June 1, 1954, p. 18):

> ". . . there is no time to waste if truth is to win the war for the minds of men! Here is the unend-

[4] See testimony of Dr. Geoffrey F. Chew, of Federation of American Scientists, Hearings (Security and Constitutional Rights), Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, 84th Cong., 2d sess., pursuant to S. Res. 94, Nov. 14, etc., 1955, pp. 86-103, *passim;* see, also, testimony of Dr. Warren Weaver, member of National Science Board and vice-president of Rockefeller Foundation, before a Congressional Committee, reported in Washington Post and Times Herald, Jan. 23, 1958, p. A12.

ing mission of the university—indeed of every educational institution of the free world—to find and spread the truth!

"We send professors, scholars and students out to the schools of the free world, to promote understanding of us even as they grow in knowledge and understanding of others. This practice must be accelerated.

Foreign travel is equally important in the struggle for understanding and peace among nations. See Address of President Eisenhower, *The Geneva Conference of Heads of Government* (1955) 63; and letter of President Truman to Nikolai M. Shvernik, president of Soviet Presidium, quoted in Comment, 61 Yale L.J., *supra*, 202, n. 191 (". . . We shall never be able to remove suspicion and fear as potential causes of war until communication is permitted to flow, free and open, across international boundaries").

Certainly not less important for a vital democracy is the opportunity such travel affords its citizens to attain first hand familiarity with the operation of their Government's policies abroad. Thus, we become better qualified constructively to criticize and to shape those policies. "Citizens should not be required to make up their minds on these matters merely on the basis of what they are told by the government or a few foreign correspondents. The right of individuals to go abroad and to gain their own impressions of people and events in other countries is a matter of importance to them as citizens and to a government which draws all its powers from their votes." Comment, 61 Yale L.J., *supra*, 191; see Chafee, *op. cit. supra*, 196.

These are among the cogent considerations which make the right to travel abroad indispensable to a free society. It is most significant that "freedom of mobility and political power in the hands of the people have generally appeared at the same time . . . [and that] one of the first acts of any dictatorship or police state is to repress the

free movement of the population" (Vestal, *Freedom of Movement*, 41 Iowa L.R. 6, 13 (1955); cf. Comment, 61 Yale L.J., *supra*, 202); and that freedom of movement has found expression in the Universal Declaration of Human Rights and many modern constitutions.[5]

B. *A passport is presently a prerequisite to travel abroad.*

Prior to World War II, a passport was not necessary for travel abroad in time of peace.[6] Now, however, by

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[5] Article 13 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948, provides (United Nations Department of Public Information, Universal Declaration of Human Rights (1949), S.Doc. 123, 81st Cong., 1st Sess., 1156):

"(1) Everyone has the right to freedom of movement and residence within the borders of each State.

(2) Everyone has the right to leave any country, including his own, and to return to his country."

The right of free movement has expressly been embodied in the constitutions of the following nations: Argentina, Mar. 16, 1949, Art. 26, 1 Peaslee, *Constitutions of Nations* (The Netherlands, 2d ed., 1956) 50; Bolivia, Nov. 23, 1945, Art. 6, *Id.* 179; Chile, Sept. 18, 1925, Art. 10(15), *Id.* 485; China, Dec. 25, 1947, Art. 10, *Id.* 516; Costa Rica, Nov. 8, 1949, Art. 22, *Id.* 578; Cuba, July 5, 1940, Art. 30, *Id.* 616; Ecuador, Dec. 31, 1946, Art. 187 (5), *Id.* 805; El Salvador, Sept. 8, 1950, Art. 154, *Id.* 839; Guatemala, Aug. 10, 1954, Art. 15(b), 2 Peaslee, etc., 121; Honduras, Mar. 28, 1936, Art. 67, *Id.* 163; Indonesia, Aug. 15, 1950, Art. 9, *Id.* 373; Italy, Jan. 1, 1948, Art. 16, *Id.* 484; Japan, Nov. 3, 1946, Art. 22, *Id.* 514; Mexico, Jan. 31, 1917, Art. 11, *Id.* 664; Nicaragua, Nov. 1, 1950, Art. 60, 3 Peaslee, etc., 10; Peru, Apr. 9, 1933, Art. 67, *Id.* 140; Turkey, Jan. 10, 1945, Arts. 70, 78, *Id.* 410, 411; Uruguay, Oct. 26, 1951, Art. 37, *Id.* 615; Venezuela, Apr. 11, 1953, Art. 35(5), *Id.* 708.

Various treaties of friendship, commerce and navigation to which the United States is a party similarly assure that nationals of each signatory "shall be permitted to enter the territories of the other . . . and shall be permitted freely to reside and travel therein". See, e.g., Treaty between the United States and the Italian Republic, Feb. 2, 1948, Art. I, § 1, 63 Stat. 2256; Vestal, 41 Iowa L.J., *supra*, 25, n. 61.

[6] For the civil war, see Dep't of State, The American Passport (1898) 49 ff. As to World War I, see 40 Stat. 559 (1918), and Procl. No. 1473, 40 Stat. 1829 (1918).

reason of section 215 of the Immigration and Nationality Act of 1952 and an implementing Presidential proclamation, it is unlawful for petitioner or any other citizen "to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport" (8 U.S.C. 1185(b))[7]

Thus, what was at one time "a desirable incident to travel, not a necessity" has become and is presently "a document which is essential to lawful departure of an American citizen" and without which entry into most foreign countries is impossible. *Shachtman* v. *Dulles*, *supra*, 225 F.2d at 940, 941; see *Bauer* v. *Acheson*, *supra*, 106 F. Supp. at 451; Comment, 61 Yale L.J., *supra*, 171, n. 3, and 172.

In short, denial of a passport is today equivalent to denial of the right to travel abroad. It is in the light of these considerations that we proceed to an examination of the Secretary's passport denial in the instant case.

II.

The Secretary's Reliance On Secret Information In Denying A Passport To Petitioner Violates Due Process.

The Secretary's denial of a passport to petitioner is based in vital part on information allegedly in State Department files which the Secretary has refused to disclose either to petitioner or to the courts. Each of the Secretary's four findings from the open record is accompanied by his recital that there is related "[c]onfidential information contained in the files of the Department of State, constituting a part of the record considered by the Passport Office, the Board of Passport Appeals" and

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[7] The pertinent provisions of section 215 are reproduced in the Appendix, *infra*, pp. 72-73. The implementing Presidential proclamation is Proclamation 3004, 37 Stat. c 31. The pertinent regulations are set forth in the Appendix, *infra*, pp. 84-86.

the Secretary (R. 276-277). As the District Court observed, the "full significance of the findings . . . can be determined only by reference" to the accompanying recitals of the undisclosed information (R. 286-287). In addition, the Secretary has acted on the basis of other undisclosed information presumably unrelated to these four findings (R. 278). Resort to secret information thus taints this entire proceeding.

The Secretary says that the undisclosed information germane to the four findings "relates to the internal security of the United States", and that, in his judgment, disclosure of its sources and details "would . . . be detrimental to our national interest by compromising investigative sources and methods and seriously interfering with the ability of . . . [the State] Department and the Executive Branch to obtain reliable information affecting our internal security" and "would have an adverse effect upon our ability to obtain and utilize information from sources abroad and interfere with our established relationships in the security and intelligence area" (R. 278). Disclosure of the other secret information, unrelated to the four findings, "might . . . prejudice the interest of United States foreign relations" (*ibid.*).

The Court below erroneously assumed that the substance of the confidential information had been disclosed to petitioner (R. 298). This is by no means so. All the Secretary has told us are what, in his view, the confidential information "indicates" (with respect to Findings I, III, and IV) or "establishes" (with respect to Finding II) (R. 276-277). In no instance have we been given the substance, details, or sources of such information. Moreover, with respect to Finding V (R. 275), equally essential to the decision of passport denial, the Secretary has furnished not even a hint of what the undisclosed information may concern. Not the slightest indication appears anywhere in the record.

It has been urged below that the secret information deals with petitioner's associates and not with himself, and that, consequently, its revelation would make no difference to petitioner's case (Br. for Appellee, Appeal No. 13,717, p. 42). The short answer to this contention is that if petitioner has been deprived of the right to a fair hearing, "he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation". *Simmons* v. *United States*, 348 U.S. 397, 406. Moreover, the use of the undisclosed information has impaired petitioner's liberty, not his associates'; it is therefore little solace to be told that the information does not concern him.

Absent knowledge of details and sources, how can it be assumed that disclosure will be unavailing? Revelation may show that a good portion of the information does not even exist or that it is patently incredible. An objective analysis may demonstrate that the inferences drawn by the Secretary from the information are unjustified: after all, "Communist activities", "involvement in espionage", or "Communist propaganda" are but subjective symbols, which, to a more careful and impartial observer, may appear unfounded. Disclosure may demonstrate that the activities of petitioner's associates, however they may be characterized, occurred at times far remote from when petitioner associated with them.

Thus, if, in fact, the Science for Victory Committee "was conceived and organized by Communist officials for propaganda and espionage activities" (R. 276), such designs, it may be revealed, early proved abortive and were abandoned prior to petitioner's association with the organization. If, in fact, the Collinses and Rose Segure were at any time "members of the Communist Party" (*ibid.*), revealment may prove that their membership antedated petitioner's association with them. If, in fact, Sarant "was an active member of the Communist Party

. . . [and] involved in the espionage apparatus of Julius Rosenberg" (R. 277), disclosure may reveal that such membership and involvement long predated petitioner's first meeting with Sarant, in the fall of 1946. If, in fact, Sarant's New York City apartment "was used by Julius Rosenberg and other members of the spy ring" (*ibid.*), disclosure may demonstrate that that apartment was so used long before petitioner met Sarant and learned that there was such an apartment. Indeed, on confrontation with and cross-examination of the confidential informants, even their characterizations of petitioner's associates, if characterizations there were, may prove unfounded.

The majority below note that this Court has never passed upon the precise question whether reliance on secret information to deny a citizen's right to travel comports with due process and that they share with Americans the resentment and opposition to such procedure (R. 295, 299). Nevertheless, they feel compelled to sanction so radical a course because of the "necessitous circumstances of public concern" and because the "cases and common sense hold that the courts cannot compel the Secretary to disclose information garnered by him in confidence in this area." (R. 299, 300). We address ourselves to these considerations.

A. *The cases relied on by the court below.*

We consider first the cases to which the court below refers: *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304; and *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U.S. 103; and the others cited by the District Court: *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294; and *Williams* v. *New York*, 337 U.S. 241. Certainly, these decisions are no authority for the ruling below.

Not only, as the court recognizes, do these several cases (*Williams* excepted) involve "commerce, more readily subject to regulation, or deprivation, than are the inherent rights of individuals" (R. 298). They are further "distinguishable . . . because they do not involve indi-

vidualized fact finding and classification, but legislative determinations, political judgments, and the exercise of judicial discretion in the imposition of sentence." *Gonzales* v. *United States*, 348 U.S. 407, 412, n. 4. Moreover, *Curtiss-Wright Corp.* and *Waterman Corp.* both concern the Executive's exercise of its foreign affairs functions; and, as the court below observes: "The issuance of a passport is not the conduct of foreign affairs" (R. 300).

In *Curtiss-Wright Corp.*, a Congressional joint resolution implemented by a Presidential proclamation, embargoing munitions shipments to Bolivia, was sustained against an attack for invalid delegation of legislative power, the Court saying (299 U.S. at 315):

> "Whether if the Joint Resolution had related solely to internal affairs it would be open to challenge. . . . we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. . ."

What was there delegated to the President was the power to lay down *general* rules in the field of foreign affairs; and in such circumstances, and "especially . . . in time of war" (at 320), the Court recognized that the President "has his confidential sources of information", that secrecy with respect to such information "may be highly necessary, and the premature disclosure of it productive of harmful results" (*ibid.*).

Waterman Corp. held an order of the Civil Aeronautics Board authorizing an American air carrier to engage in foreign air transportation immune from judicial review either before or after approval by the President; on the ground that, before approval, the order had no force and effect and that, after approval, it constituted a political matter. The Court noted that such orders "embody Presidential discretion as to political matters beyond the com-

petence of the courts to adjudicate" (333 U.S. at 114): and, further, that (at 111):

> " . . . Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy . . . They are decisions of a kind for which the judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry . . ."

Norwegian Nitrogen Co. held a statutory requirement of "hearing" satisfied even though the Tariff Commission relied on an American company's cost of production without revealing those costs to a Norwegian competitor company. The Court pointed out that the "process of tariff-making by Congress and congressional committees is not different in essentials from that for legislation generally . . . The hearing is not one that may be demanded as of right . . ." (288 U.S. at 304); and that "[w]hat is done by the Tariff Commission and the President in changing the tariff rates to conform to new conditions is in substance a delegation, though a permissible one, of the legislative process . . ." (at 305). The Court explicitly distinguished that order from "the kind of order that emerges from a hearing before a body with power to ordain [which] is one that impinges upon legal rights in a very different way from the report of a Commission which merely investigates and advises" (at 318).

In *Williams*, the Court held the defendant and his counsel not entitled to confront and cross-examine persons from whom a trial judge obtained information before he imposed a sentence of execution after the jury had recommended life imprisonment. Although due process requires "that no person shall be tried and convicted of an offense unless he is given reasonable notice of the charges against him and is afforded an opportunity to examine adverse

witnesses", long established historical practice with respect to the sentencing function, sound practical reasons, and the salutary modern concepts for individualization of punishment require that a sentencing judge be permitted broad discretion and access to a wide variety of information (337 U.S. at 245-251).

Reliance on such decisions to justify resort to confidential information in a case such as ours betrays an all too frequent confusion between adjudicative and legislative fact finding. "The conclusion seems rather fully supported that a party who has a sufficient interest or right at stake in a determination of governmental action should ordinarily have an opportunity for a trial type of hearing on issues of adjudicative facts, but that such a hearing ordinarily is not required on issues of legislative facts". Davis, *The Requirement of a Trial Type Hearing*, 70 Harv. L.Rev. 193, 212 (1956).*

We are not here dealing with the use of secret information in the promulgation of regulations of general application, a function which might well be assimilated to the legislative process. We need not consider whether a general bar to travel to India (as that recently imposed for travel to the mid-East) might conceivably be immune from judicial scrutiny. There is no such general proscription here. Far from it. The Secretary has concluded that this *one individual*, petitioner, is going abroad to engage in activities which will advance the Communist movement for the purpose, wilfully and knowingly, of advancing that movement. He has barred petitioner *alone*, in "the national interest", from travel abroad. Other research

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* ". . . Adjudicative facts are facts about the parties and their activities, businesses, and properties, usually answering the questions of who did what, where, when, how, why, with what motive or intent . . . Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion." Davis, *op. cit.*, 199.

physicists presumably remain free to accept employment at and to go to the Tata Institute, there to work with Dr. Peters and his colleagues. Only this one passport applicant is prohibited from doing so. And solely because the Secretary has made findings concerning petitioner *himself*, characterizing and stigmatizing *him alone* as an individual bent on Communist activity abroad.

B. *The conflict with Parker v. Lester, 227 F.2d 708 (C.A. 9).*

The several cases cited by the lower courts are thus quite different from the case at bar. And the Court of Appeals for the Ninth Circuit recognized the distinction when it invalidated the security regulations of the Coast Guard in *Parker* v. *Lester*, 227 F.2d 708, a decision clearly in conflict with the ruling below.[9]

Parker involved the procedural rights of seamen applying for the specially validated merchant mariners' documents which Coast Guard security regulations today require for seamen's employment on vessels. That these documents in effect are seamen's passports is evident from the State Department's regulation which exempts a seaman travelling abroad from the passport requirement if he possesses a "speciallly validated United States merchant mariner's document issued by the Coast Guard". 22 CFR 53.3(c), as amended; republished 22 F.R. 10836 (Dec. 27, 1957). Thus, the *Parker* case and the instant suit are counterparts.

Despite the Government's insistence that security considerations preclude revealment of the secret information relied on, the Ninth Circuit Court of Appeals struck down the Coast Guard regulations because they permitted reliance by the Coast Guard on data concealed from the seamen affected, thus denying them the right of cross-

[9] Although *Parker* was argued to the court below, its opinion surprisingly makes no reference to the case.

examination; and because they contemplated decisions denying a particular seaman his merchant mariner's document on a record containing "facts" unknown to him and thus beyond his power to refute. The court held that the "system of secret informers, whisperers and tale-bearers [is not] of such vital importance to the public welfare that it must be preserved at the cost of denying to the citizen even a modicum of the protection traditionally associated with due process". *Parker* v. *Lester*, *supra*, 227 F.2d at 719.[10] See, also, *Boudin v. Dulles*, 136 F.Supp. 218 (D.D.C.), mod. and aff'd. 235 F.2d 532 (C.A. D.C.).[11]

C. *The due process requirement of a fair hearing.*

As the court below has consistently held, the right to travel abroad and to the passport requisite to such travel is protected by the constitutional guarantee of "liberty" and may be fettered, if at all, only after a due process hearing (Point I). "When the Constitution requires a

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[10] The Government did not petition for certiorari in the *Parker* case. It apparently has accepted the decision of the Court of Appeals; for the Coast Guard has revised its regulations to comport with the court's ruling and has granted clearance documents to the affected seamen.

[11] The District Court's decision in the *Boudin* case held invalid section 51.170 of the Passport Regulations here in issue, which section permits the Board of Passport Appeals to consider confidential information. Judge Youngdahl said, in part (at 222): ". . . The right to a quasi-judicial hearing must mean more than the right to permit an applicant to testify and present evidence. It must include the right to know that the decision will be reached upon evidence of which he is aware and can refute directly. See *Dulles* v. *Nathan*, . . . 225 F. 2d 29, 30-31 . . . When the basis of action by any branch of the government remains hidden from scrutiny and beyond practical review, the seeds of arbitrary and irresponsible government are sown. More and more the courts have become aware of the irreparable damage which may be, has been, and is, wrought by the secret informer and faceless tale-bearer whose identity and testimony remains locked in confidential files . . ."

hearing", however, "it requires a fair one . . ." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50. And confrontation and cross-examination are essential ingredients of a fair hearing (*In re Oliver*, 333 U.S. 257, 273; emphasis supplied):

> " . . . A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and *these rights include, as a minimum, a right to examine the witnesses against him*, to offer testimony, and to be represented by counsel . . ."

It is constitutional principle and simple logic that

> " . . . manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute . . ." (*I.C.C.* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 93)

See, also, *Roviaro* v. *United States*, 353 U.S. 53; *Jencks* v. *United States*, 353 U.S. 657; *United States* v. *Andolschek*, 142 F.2d 503 (C.A. 2, per L. Hand, J.), quoted with approval in *Jencks*, *supra*; *United States* v. *Coplon*, 185 F. 2d 629 (C.A. 2, per L. Hand, J.), cited with approval in *Roviaro*, *supra*; *United States* v. *Krulewitch*, 145 F.2d 76 (C.A. 2); cf. *Remmer* v. *United States*, 347 U.S. 227.

We are mindful that this principle finds most frequent application in criminal proceedings, where the Sixth Amendment is explicit authority for the defendant's right "to be confronted with the witnesses against him". But even in deportation cases, an area of alien control, where the jurisdiction of the Executive has been characterized variously as "inherent in the executive power" (*United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542), and "absolute and unqualified" (*Fong Yue Ting* v. *United States*, 149 U.S. 698, 707), due process has consistently been held to require confrontation and cross-examination. *Unger* v. *Seaman*, 4 F.2d 80, 82 (C.C.A. 8); *Maltez* v.

Nagle, 27 F.2d 835, 837 (C.C.A. 9); *Svarney* v. *United States*, 7 F.2d 515, 517-518 (C.C.A. 8); *Sardo* v. *McGrath*, 196 F.2d 20, 22 (C.A.D.C.); see *Wong Yang Sung* v. *McGrath*, *supra*, 339 U.S. at 50; cf. *Jay* v. *Boyd*, 351 U.S. 345.[12] And the invalidity of administrative action predicated on undisclosed "facts" has long been established. *Morgan* v. *United States*, 304 U.S. 1; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292; *Bratton* v. *Chandler*, 260 U.S. 110; *Lloyd Sabaudo S.A.* v. *Elting*, 287 U.S. 329, 335-336, 339-340; *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117, 123; *United States* v. *Abilene & S.R. Co.*, 265 U.S. 274, 288-289; *In re Carter*, 192 F.2d 15 (C.A.D.C.), cert. den. 342 U.S. 862; *Jordan* v. *American Eagle Ins. Co.*, 169 F.2d 281, 288 (C.A.D.C.), and cases cited.

A passport proceeding, in its effect on the passport applicant, is tantamount to a criminal prosecution. Petitioner, it is true, has not been charged with a statutory crime and put in peril of imprisonment. But he too is a person accused; he has been barred from enjoyment of rights accorded to his fellow citizens; he has been confined to the limits of his own country, though not to jail. In these days when one can journey to Europe more quickly than petitioner's colonial forbears could span the distance from Massachusetts to New York, such confinement constitutes a real and substantial abridgement of freedom. See *Walker* v. *Chief Quarantine Officer*, 69 F. Supp. 980 (D. Canal Zone).

Beyond this, a high Federal official has branded petitioner a person disloyal or intent on disloyalty to his

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[12] ". . . Although such aliens have been given a right to a discretionary determination on an application for suspension . . ., a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it 'comes as an act of grace' . . ., and 'cannot be demanded as a right . . .'" 351 U.S. at 354.

Government. The "badge of infamy" which decisions such as this one pin on our citizens impairs "substantial rights affecting . . . [their] lives and property". *Peters* v. *Hobby*, 349 U.S. 331, 347; *Wieman* v. *Updegraff*, 344 U.S. 183, 191. Indeed, "in view of the stigma attached" by such rulings, "the need for procedural safeguards seems even greater than in other cases". *Cole* v. *Young*, 351 U.S. 536, 546. In such circumstances, to deny petitioner a passport on the basis of confidential information which he cannot see or answer is notoriously to disregard the "[p]rocedural fairness and regularity [which] are of the indispensable essence of liberty". *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 224 (Jackson, J. dissenting).

Procedural due process for this quasi-defendant[13] should mean nothing less than the Constitution explicitly accords the basest defendant in a criminal proceeding. The rights of confrontation and freedom from accusation and conviction *in camera* are among the fundamental safeguards in our jurisprudence. These rights were stressed in the English Bill of Rights and have found expression in all American constitutions from the beginnings of our history. Pound, *The Development of Constitutional Guarantees of Liberty* (1957) 84-85. They were essential elements even of "the ancient historic traditions of fair play". O'Brian, *National Security and Individual Freedom* (1955) 61-62.[14]

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[13] ". . . While the applicant for a passport who has been turned down on loyalty grounds is not a defendant, in the strict sense of the term, he is at least a quasi-defendant, and as such is legally entitled to at least a quasi-judicial hearing before he is finally stigmatized by a government department and denied a valuable right." Fellman, *The Defendant's Rights* (1958) 258.

[14] O'Brian recalls the report to King Agrippa respecting the apostle Paul: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning

D. *The appeal to "common sense".*

The majority below invoke "common sense" in support of their holding (R. 300). We submit, however, that the American mores dictate rather that no person be stigmatized, accused, and shorn of his liberty on undisclosed information and the *ipse dixit* of a Federal officer.

President Eisenhower has epitomized the American code of conduct in this regard: " . . . In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose." Statement of President Eisenhower, Nov. 23, 1953, quoted in *Jay* v. *Boyd, supra,* 351 U.S. at 373 (Frankfurter, J., dissenting). We assume that a public officer is subject to at least the same rules of fair dealing as is a private citizen.

Mr. Dean Acheson, who, as Secretary of State, promulgated the Passport Regulations, has since recognized that they reflect "a grave mistake and a failure to foresee consequences which were inevitable"; and he characterizes the practice of secret evidence and secret informers which the Regulations sanction, as "alien to our conception of justice and the rights of the citizen". Acheson, *A Democrat Looks at His Party* (1955) 127, 129. "Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life . . ." *Peters* v. *Hobby, supra,* 349 U.S. at 351 (Douglas, J., concurring).

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the crime laid against him". The Acts, 25:16. And Trajan's instructions to the younger Pliny as to treatment of a new sect known as Christians: "anonymous accusations must not be admitted in evidence as against anyone, as it is introducing a dangerous precedent, and out of accord with the spirit of our times." Private Letters, Pagan and Christian: An Anthology (London, 1929) 82.

E. *The appeal to security considerations.*

To justify suppression of the information on which he has acted, the Secretary advances considerations which have become commonplace in loyalty and security proceedings. Disclosure, he says, would compromise investigative sources and methods, interfere with the Executive's ability to obtain security and intelligence information internally and abroad, and possibly prejudice foreign relations (R. 278).

Such formulations are, of course, not unique to our time. The guarantees embodied in our Bill of Rights were established for the very purpose of protecting the individual "against the same 'reasons of state' which are being asserted today to justify secret evidence, anonymous accusers, secret hearings, and so on". O'Brian, *op. cit. supra*, 58, citing Holdsworth, *History of English Law*, IX (1926) 235.[15]

The question, moreover, as Judge Learned Hand observed in *United States* v. *Andolschek, supra*, is not whether the Government may be compelled to reveal the sources and details of its confidential information; it is, rather, whether, having utilized such information to deprive a citizen of his constitutional rights, the Government may still hold it secret. No one suggests that the Secretary be forced to open any of his files. But once

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[15] With respect to the appeal to security considerations, a recent statement of Mr. Adlai E. Stevenson is worthy of note:

> "The threat to freedom which I sense today is nothing very concrete. It is simply a vague widely held feeling that perhaps we must choose between freedom and survival, and that obviously the choice must be survival.
>
> "I say no such choice confronts us. I say the choice is among various national policies to insure national survival—and that as respects freedom we have no choice at all but to maintain it more vigilantly and vigorously than ever."
>
> (Speech in Chicago, Ill., Dec. 16, 1957, reported in Civil Liberties (ACLU), No. 157, Jan. 1958)

having dipped into those files to justify the passport denial to petitioner, we insist that he may no longer suppress them; the "government must choose; either it must leave the . . . [information] in the obscurity from which a trial will draw . . . [it], or it must expose . . . [it] fully". *Id.*, 142 F.2d at 506.

If we examine the conflicting interests involved, the balance is strongly in favor of disclosure. There is no need to dwell on the severity of the injury which petitioner clearly suffers. The freedom of which he is being deprived is a vital one, and the stigma imposed on him drastic—to good name, reputation, livelihood, and opportunity for self-expression and development. On the contrary, the prejudice which the Government claims will flow from disclosure is, to say the least, fanciful. As the Ninth Circuit Court of Appeals put it, in *Parker* v. *Lester*, *supra*, 227 F.2d at 720-721:

> ". . . It is unbelievable that the result [of disclosure] will prevent able officials from procuring proof any more than those officials are now helpless to procure proof for criminal prosecutions . . . Indeed, it may well be that in the long run nothing but beneficial results will come from a lessening of . . . talebearing. It is a matter of public record that the somewhat comparable security risk program directed at Government employees has been used to victimize perfectly innocent men. The objective of perpetuating a doubtful system of secret informers likely to bear upon the innocent as well as upon the guilty and carrying so high a degree of unfairness . . . cannot justify an abandonment here of the ancient standards of due process."

In appraising the relative interests of petitioner and the Government, it is essential to consider just what kinds of information and sources we are urged to protect from revealment. Thus we cannot, of course, know with certainty in our particular case; nor, indeed, whether the information referred to even exists. The general practices

of the State Department, however, make it clear that the secret information here used, such as it may be, is substantially of the same ilk as that widely employed in the Government employee security-risk programs.

In 1956, the Director of the Passport Office testified that there were then *twelve million* index cards against which that Office checked each passport application; that those cards contained information derived from the House Committee on Un-American Activities, intelligence agencies, and "other such sources of information"; and that the information was such as would indicate "whether the person has any reported affiliation with the Communist movement, whether the person is under court restraint, if the person is considered indigent, if the person has a bad reputation or has given bad reputation to the United States by his actions abroad—that sort of information": Hearings (Investigation of the Unauthorized Use of United States Passports), Committee on Un-American Activities, H.R., 84th Cong., 2d sess., May 23, 1956, p. 4314.[16] The Passport Office index included "all pertinent names mentioned in connection with an investigation, besides the name being investigated". *Report of the Commission on Government Security* (1957) 467. Investigative reports of the F.B.I., as one might expect, are among the sources, if not the primary source, of the State Department's files. *Ibid.*; and see R. 66-67.

Thus, the undisclosed data here is derived from that "congeries of information, important or trivial, authentic

[16] See, also, testimony of Mr. Scott McLeod, Administrator of the Department's Bureau of Security and Consular Affairs, in Hrgs. (Security and Constitutional Rights), *supra*, 167: ". . . we would receive information from any source in the Government or outside the Government that felt they wanted to apprise the Passport Office of the possibility that someone might travel if they felt that there was some reason why they should not travel. Any of the agencies of the Government are perfectly at liberty to give us any information they may have that relates to this question and private citizens are also at liberty to do so."

or mere gossip, significant or meaningless, that through the years has accumulated in the records" of the F.B.I. and other governmental and quasi-governmental agencies and bureaus. Bontecou, *The Loyalty-Security Program* (1953) 95. And its reliability is of the same dubous quality. See Bontecou, *op. cit.*, 82-90, 95-98, and *passim;* Barth, *The Loyalty of Free Men* (1951) 157-159, 162-165.[17]

It is not surprising therefore, that even the State Department lacks confidence in the integrity of the information on which it relies. This is dramatically illustrated by several cases which have recently received publicity. *Dr. Linus Pauling*, the world renowned chemist, was refused a passport for two and a half years because, said the Department, undisclosed sources had alleged that he was "a concealed member of the Communist Party" and displayed "a consistent and prolonged adherence to the Communist Party line". Nevertheless, when, in 1954, Dr. Pauling was awarded the Nobel Prize, the Department, with alacrity and without further evidence or hearing, reversed itself and issued a passport.[18] *Dr. Martin Kamen*, a scholar in radiation physics and biochemistry, was refused a passport for some eight years because the Department insisted it had information that he was a supporter of the Communist movement and was going abroad for the purpose of advancing that movement. When he sued in the courts, the Department reversed itself and issued a pass-

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[17] The character of information in State Department confidential files is exemplified by the advice afforded petitioner by the Board of Passport Appeals that among the persons with whom petitioner's relationship was considered pertinent to his eligibility for a passport was Mr. Louis S. Weiss (R. 49). Mr. Weiss, the father of one of petitioner's friends (R. 142-143), was, until his death in 1950, a member of the New York law firm which still includes his name: Paul, Weiss, Rifkind, Wharton and Garrison. Martindale-Hubbell Law Directory (1958).

[18] Pauling, *My Efforts to Obtain a Passport*, 8 Bull. of Atomic Scientists 253 (1952); and see testimony of Dr. Pauling (Hrgs. [Security and Constitutional Rights], *supra*, 103-141); and of Mr. Scott McLeod (*Id.*, 186-195).

port without further hearing or other evidence.[19] *Dr. Otto Nathan*, executor of the estate of Albert Einstein, was denied a passport for nearly two years. During the course of his appeal in the court below, the Department filed an affidavit averring that "after full and careful consideration", it "has concluded that it would be contrary to the best interests of the United States" to issue a passport to Dr. Nathan. The court nevertheless ordered that a prompt quasi-judicial hearing be afforded Dr. Nathan. Within four days of that order, the Department granted him a passport without further hearing. *Dulles* v. *Nathan*, 225 F.2d 29.

The findings in our very case betray the will-of-the-wisp quality of the information on which the Secretary depends. He evaluates the confidential information related to three of his findings as "*indicating*" facts, whereas the information related to the fourth finding is spoken of as "*establishing*" facts (R. 276-277). This startling dichotomy is, we are sure, not inadvertent; the Secretary is too able a lawyer and a draftsman. Obviously, he himself is not persuaded that the confidential information on which he depends is reliable. And how can we accord any respect whatever to his statement in Finding IV: that confidential information "*indicates*" that Dr. Peters "is *suspected* of being a Communist espionage agent" (R. 277). Here, indeed, is suspicion heaped upon surmise.

Such incredulity is understandable when we note that the Secretary concededly himself sometimes does not know the identity and so cannot judge the veracity of his informants. See the stipulation in *Kamen* v. *Dulles*, D.D.C., Civil Action No. 1121-55, which appears in Hrgs. (Security and Constitutional Rights), *supra*, 92-93; and the affidavit of John Foster Dulles, dated Jan. 11, 1956, in the

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[19] See Hrgs. (Security and Constitutional Rights), *supra*, 88-94, 212-214; Boudin, 56 Columbia L.R., *supra*, 68, n. 127.

record on appeal in *Boudin* v. *Dulles*, Court of Appeals, D.C., No. 13031. Since he himself has no opportunity to ascertain the credibility of the confidential informants, the Secretary perforce abdicates judgment to the F.B.I. and to the other agencies whose anonymous reports he indiscriminately employs. Here, too, as in the Government employee cases, judgments are reached on evidence which he who judges "cannot even appraise. The critical evidence may be the word of an unknown witness who is 'a paragon of veracity, a knave, or a village idiot'. His name, his reputation, his prejudices, his animosities, his trustworthiness are unknown both to the judge and to the accused . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 180 (Douglas, J., concurring). This Court has cautioned that "[j]udgment on issues of public moment based on such evidence, not subject to probing by judge and opposing counsel, is apt to be treacherous", *Eccles* v. *Peoples Bank*, 333 U.S. 426, 434. Due process is clearly lacking when the officer authorized to decide is denied access to the very information essential to his decision.

The vice of permitting an Executive officer *carte blanche* in decisions affecting liberty, where the record is subject neither to examination, cross-examination, and refutation, nor to judicial scrutiny, becomes apparent at another point in the history of our case. When this action came on initially for consideration in the District Court, the affidavit submitted by the Department stated that the Science for Victory Committee "was reported to have been organized by the Communist Party for propaganda purposes" (R. 55). After remand to the Department, the Secretary, on the basis of the same undisclosed information (it is not suggested that anything more was added), characterizes the Committee as one "conceived and organized by Communist Party officials as a front for propaganda and *espionage* activities" (R. 276; emphasis supplied). Sarant, initially described as a person to whom Julius Rosenberg "was known personally" (R. 54), in the later

version becomes a person "[who] was *involved in the espionage apparatus of Julius Rosenberg.*" (R. 277; emphasis supplied) These are by no means insignificant variations.

Involvement in espionage is a serious matter, and one does not expect such charges to be casually indulged in by responsible government officials. Yet, once allow Government officers to evaluate and interpret confidential reports *in camera*, and to summarize and characterize them as they will; and we shall inevitably find such variable glosses on the record and shall ever remain helpless to search out the truth. Here indeed is a fertile field abounding in vast oportunities for subjective judgments, where secrecy most amply "provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of the informer undetected and uncorrected." *United States ex rel. Knauff* v. *Shaughnessy, supra*, 338 U.S. at 551 (Jackson, J., dissenting).

F. *The appeal to the war power.*

The Secretary seeks support for secrecy also in the war power. In this respect, he refers us to *Hirabyashi* v. *United States*, 320 U.S. 81 and *Korematsu* v. *United States*, 323 U.S. 214.

A reading of those cases, however, reveals that, "Nothing short of apprehension by the proper military authorities of the gravest imminent dangers to the public safety can constitutionally justify" governmental restrictions such as there involved. *Korematsu*, 323 U.S. at 218. Accepting the Secretary's every finding and conclusion in this proceeding, the dangers from petitioner's travel to India could not in the least wit approximate the evils which the military orders in *Hirabyashi* and *Korematsu* sought to avert. Furthermore, in *Hirabyashi* and *Korematsu*, this Court ascribed considerable significance to the cooperation there evinced between the Congress and the Executive in their joint approval of the standards established

by the military. See *Hirabyashi, supra,* 320 U.S. at 91-92, 95, 104, and *Korematsu, supra,* 323 U.S. at 217-218. Such joint action, however, is lacking here; Congress has at no time approved the standards for passport denial or procedures here applied (see Point VII, *infra.*)

Such attempted aggrandizement of Executive authority by resort to the war power has only recently been struck down: *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579. Moreover, there is an obvious and radical difference between conditions which prevail during an actual state of war and those attending an emergency, such as that confronting us today. Cf. Pye, *The Legal Status of the Korean Hostilities,* 45 Georgetown L.J. 45 (1956). To depart from traditional due process, reluctant though one may be to do so, during a period of actual war, "when there is no time for 'litigious interruption'. *Falbo* v. *United States,* 320 U.S. 549, 554" (*United States* v. *Nugent,* 346 U.S. 1, 10), is one thing. To ignore fair procedures when, whatever the urgency of the world struggle, we are not in the midst of a shooting war, is quite another. "The enemy is not yet so near the gate that we should allow respect for the tradition of fairness, which has heretofore prevailed in this country, to be overborne by military exigencies". *United States* v. *Nugent, supra,* 346 U.S. at 13 (Frankfurter, J., dissenting). The late Mr. Justice Jackson, more than a decade ago, cautioned against such a perversion of the war power as to afford a permanent excuse for unlimited Executive authority. *Woods* v. *Cloyd W. Miller Co.,* 333 U.S. 138, 146-147 (Jackson, J., concurring).[20]

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[20] Mr. Justice Jackson said, in part:

"No one will question that this [the war] power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by the judges

G. *Conclusion.*

It is crystal clear that the practice here applied, by which petitioner has been deprived of his liberty on the basis of secret information, seriously threatens the fabric of our democratic way of life. Many years ago, Mr. Justice Matthews admonished that " the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself". *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370.

The Secretary's reliance on undisclosed information is plainly in violation of due process. The feeble excuses offered for its use do not justify departure from traditional standards of fairness. Mr. Justice Frankfurter has aptly enunciated the principles which should govern here (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, 341 U.S. at 170-172, concurring):

> "The heart of the matter is that democracy implies respect for the elementary rights of men, however

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under the influence of the same passions and pressures. Always . . . the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed.

"Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinized with care.

". . . I cannot accept the argument that war powers last so long as the effects and consequences of war for, if so, they are permanent—as permanent as the war debts . . ."

The decisions of the House of Lords in *Rex* v. *Halliday* (*Ex parte Zadig*), [1917] A.C. 260, and in *Liversidge* v. *Anderson*, [1942] A.C. 206, on which the Secretary has also relied, were cases likewise decided during the heat of wars and when Great Britain was in mortal danger of invasion. We respectfully refer the Court to the eloquent dissent of Lord Shaw in *Ex Parte Zadig*, *supra*, [1917] A.C. at 292.

suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

"An opportunity to be heard may not seem vital when an issue relates only to technical questions susceptible of demonstrable proof on which evidence is not likely to be overlooked and argument on the meaning and worth of conflicting and cloudy data not apt to be helpful. But in other situations an admonition of Mr. Justice Holmes becomes relevant. 'One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point . . .' It should be particularly heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe . . . Appearances in the dark are apt to look different in the light of day.

"Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."[21]

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[21] In one of Mr. Justice Jackson's last addresses (40 A.B.A.J. 19,21 (1954)), he said: "We cannot approve of any use of official powers or position to prejudice, injure or condemn a person in liberty, property or good name, which does not inform him of the source and substance of the charge and give a timely and open-minded hearing as to its truth—safeguards without which no judgment can have a sound foundation".

III.

The Hearing In The State Department Did Not Conform With The Administrative Procedure Act.

[We have presented the arguments relating to the constitutional status of the right to travel and to a passport (Point I) and the due process requirements of a fair hearing (Point II) prior to consideration of the impact of the Administrative Procedure Act (Point III), not because we are unmindful of our responsibility to give recognition to the doctrine that constitutional issues are to be avoided when a case can properly and fairly be decided on a more limited basis (*Peters* v. *Hobby*, *supra*; *Alma Motor Co.* v. *Timken Co.*, 329 U.S. 129); but rather because, as will appear, such constitutional considerations become pertinent to the question whether the Administrative Procedure Act governs this proceeding.]

No statute expressly provides that adjudications of passport denial by the Secretary of State "be determined on the record after opportunity for an agency hearing" (Administrative Procedure Act, June 11, 1946, c. 324, § 5, 60 Stat. 239, 5 U.S.C. 1004). Nevertheless, as we have shown (Points I and II), the Constitution compels that a fair hearing be accorded an applicant before a passport may be refused him. Accordingly, under the doctrine of *Wong Yang Sung* v. *McGrath*, *supra*, the formal requirements of the Administrative Procedure Act would appear to control this proceeding.

Nor would the exception embodied in the Act: "to the extent that there is involved . . . foreign affairs functions" (5 U.S.C. 1004), seem to be applicable. As the court below has said, "The issuance of a passport is not the conduct of foreign affairs" (R. 300); an observation fully justified by the recent transformation of the passport from a mere certificate of identity and letter of introduction to a foreign state to a prerequisite for foreign travel (see *supra*, pp. 20-21). The term "foreign affairs functions" was

not intended by the Congress "to be loosely interpreted to mean any function extending beyond the borders of the United States but only those 'affairs' which so affect relations with other governments that, for example, public rule making provisions would clearly provoke definitely undesirable international consequences". Sen. Rep. 752, 79th Cong., 1st sess., p. 13; H.R. Rep. 1980, 79th Cong., 2d sess., p. 257; 92 Cong. Rec. 5650; see, also, Atty. Gen. Manual on the Administrative Procedure Act 26-27 (1947).

It is incontrovertible that, in several significant respects, the State Department proceeding in this case did not comply with the formal requirements of the Administrative Procedure Act. Thus:

(1) As we have shown (Point II), the decision of passport denial was based in vital part on undisclosed information, with respect to which perforce petitioner was not accorded the right "to conduct such cross-examination as . . . [was] required for a full and true disclosure of the facts"; as section 7(c) of the Act, 5 U.S.C. 1006(c) (*infra*, p. 75) requires.

(2) The record acted upon by the Board of Passport Appeals and the Secretary admittedly included information other than the "transcript of testimony and exhibits" (see Point II); in violation of section 7(d) of the Act, 5 U.S.C. 1006(d) (*infra*, p. 75).

(3) Petitioner was at no time informed of or furnished with the recommendation of the Board of Passport Appeals, nor was he accorded an opportunity to file exceptions thereto (R. 9); in violation of section 8(b) of the Act, 5 U.S.C. 1007(b) (*infra*, p. 76).

(4) The Board of Passport Appeals, before formulating its recommendation, made its own supplemental investigation (R. 5); thus undoubtedly consulting other persons, without giving petitioner notice and opportunity

to participate; in violation of section 5(c) of thte Act, 5 U.S.C. 1004(c) (*infra*, p. 74).

If, then, the Administrative Procedure Act is here applicable, the Secretary's decision of passport denial must be set aside. 5 U.S.C. 1009(e) (*infra*, pp. 76-77).

IV.

The Denial Of A Passport To Petitioner Violates Due Process Because Of The Vagueness Of The Grounds On Which The Secretary's Decision Is Based.

Petitioner has stated under oath that his purpose in going abroad is to accept an appointment as research physicist at the Tata Institute of Fundamental Research in Bombay, India (R. 6, 12). The Secretary quite properly accepts petitioner's statement (R. 277). Nonetheless, and notwithstanding petitioner's repeated disavowal (R. 12, 160), the Secretary concludes that there is "reason to believe, on the balance of all the evidence, that . . . [petitioner] is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement"; and he denies the passport on that ground and "because the issuance of a passport would be contrary to the national interest" (R. 278). Nowhere in this extensive record is there any specification of the activities in which the Secretary believes petitioner will engage abroad; or of the manner in which such activities, whatever they may be, "will advance the Communist movement" or adversely affect "the national interest".

We have shown that the "facts" on which the Secretary's decision depends consist in essential part of undisclosed information; and that, for that reason, petitioner's liberties have been infringed without due process (Point II). We shall show that the Secretary's findings in any event, afford no rational basis for the conclusions he has reached (Point V). Assume, however, that all the

"facts" which the Secretary recites are true, and that his conclusions are reasonable; the criteria on which he posits the passport denial are nonetheless so hopelessly vague that they cannot satisfy due process requirements.

The first standard—engagement "in activities which will advance the Communist movement"—is that embodied in section 51.135(c) of the Passport Regulations, which makes it applicable without regard to "formal affiliation with the Communist Party" (*supra*, p. 2). And, there is no charge that petitioner has had any "formal affiliation" with the Party. Who then, under such circumstances, can, with any certainty, know what is meant by the term "Communist movement"? The term is obviously no more meaningful than the epithets "un-American" or "subversive propaganda", but recently condemned by this Court as eluding definition. *Watkins* v. *United States*, 354 U.S. 178, 202, 214; *See, also, Sweezy* v. *New Hampshire*, 354 U.S. 234, 246-247; *Jencks* v. *United States*, *supra*, 353 U.S. at 678 (Burton, J., concurring); *United States* v. *Peck*, 154 F.Supp. 603 (D.D.C.); see *United States* v. *Hautau*, 43 F.Supp. 507 (D.N.J. Nor do the Secretary's decision here or the Passport Regulations afford any guide to its meaning.[22]

Even more ambiguous is the phrase "*advancement* of the Communist movement". The term "sympathizer" in relation to testimony with respect to "Communism or Communist interests" has been held so vague as to void

[22] We are cognizant that the terms "world Communist movement" and "Communist movement" appear in the Internal Security Act of 1950, 50 U.S.C. 781 *seq.*, and have frequently been employed by Congressional committees and executive and judicial agencies. See *Briehl* v. *Dulles*, *supra*, 248 F.2d at 565-566. But the terms criticized in *Watkins* have been even more widely used. It is notable that although the Internal Security Act contains a list of definitions (50 U.S.C. 782), it includes none for the term "Communist movement." The obvious intendment is so vast and limitless that no reasonably certain guide is furnished the individual whose liberties must depend on what the term means.

an indictment for perjury. *United States* v. *Lattimore*, 215 F.2d 847, 849 (C.A.D.C.). "Follower of the Communist line" and "promoter of Communist interest" likewise have been held fatal to an indictment for perjury. *United States* v. *Lattimore*, 127 F.Supp. 405, 410, 411-412 (D.D.C.), aff'd. by equally divided Court, 232 F.2d 334 (C.A.D.C.). And, in *O'Connor* v. *United States*, 240 F.2d 404 (C.A.D.C.), the court set aside a conviction for contempt, under 2 U.S.C. 192, for refusal to respond to a question as to membership in "the Communist conspiracy", words held too "vague and imprecise" to satisfy constitutional requirements.

The second standard which the Secretary invokes—"contrary to the national interest"—is at least equally amorphous. As Professor Commager notes, this is "just the kind of official standard of conduct which has always characterified totalitarian countries"; and he acutely observes that even as we do not know, so the State Department does not know, "what are these interests which we are supposed to serve by our travel overseas". Commager, *A Nation of Travelers*, Editorial, Saturday Rev., Jan. 11, 1958, p. 69. In truth, this is no standard at all. The recent frank testimony of the Deputy Under Secretary of State makes plain that it is but a cloak for the Secretary's claim of absolute, unbridled discretion in the passport field.[23]

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[23] Deputy Under Secretary Murphy testified, as follows (Hrgs., [Dept. of State Passport Policies], Comm. on Foreign Relations, Senate, 85th Cong., 1st sess., Apr. 2 and 11, 1957, pp. 9-10):

> *Senator Fulbright.* . . . Do you consider the Secretary of State has complete discretion as to whether any American citizen may leave the United States?
>
> *Mr. Murphy.* Yes, sir; I think he does under our law and regulations.
>
> * * * * *
>
> *Senator Fulbright.* . . . Does the Secretary have complete discretion in prescribing activities which may be engaged

In *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 89, Chief Justice White characterized the attempted enforcement of the standard there held void as "the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury". Earlier this Term, reversing the conviction of a labor organizer for soliciting members without the permit required by a city ordinance under which the Mayor and city council might refuse its grant "if they do not approve of the applicant or of the union or of the union's 'effects upon the general welfare of the citizens of the City of Baxley' ", this Court

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in abroad by an American citizen, as a condition to the issuance of his passport?

Mr. Murphy. Yes, sir; I would say that particularly under this state of emergency which we now have, if the Secretary of State felt that the citizen was to engage in activities which would be detrimental to our national interests, he would have the discretion to refuse the passport.

Senator Fulbright. If he thought the manners of the man were so egregious that they would cause reflections upon us, he could refuse the passport? . . . that he would be a poor representative of our country.

Mr. Murphy. It would be a test of judgment there as to whether the activity would be injurious to our national interests.

Senator Fulbright. But if he thinks so, he may refuse the passport?

Mr. Murphy. I think in the honest exercise of his discretion, he would have the authority.

Apparently it was under this nebulous standard that Congressman Leo Isaacson was denied a passport because he was going abroad to attend a conference to aid Greek rebels; that Reverend J. Henry Carpenter, a highly respected inter-faith leader, who had once urged "high level negotiations" with the Soviet Union, was denied a passport to visit Japan; and that Reverend Stephen N. Fritchman was not permitted to attend and speak before the 100th anniversary of Unitarianism in Melbourne. Jaffe, *The Right to Travel: The Passport Problem*, 35 Foreign Affairs 17, 24 (Oct. 1956). For other passport denials on the same ground, see Comment, 61 Yale L.J., *supra*, at 174-178.

said (*Staub* v. *City of Baxley*, No. 48, O.T. 1957, Jan. 13, 1958, *slip. op.*, 9):

> ". . . These criteria are without semblance of definitive standards or other controlling guides governing the action of the Mayor and council in granting or withholding a permit. . . . It is thus plain that they act in this respect in their uncontrolled discretion."

These appraisals are peculiarly pertinent to the criterion, "the national interest", employed in our case.

In short, both grounds on which the Secretary bars petitioner from a passport and from foreign travel lack the reasonable certainty of due process criteria. They serve but as convenient vehicles for exercise of the Secretary's subjective political attitudes, leaving him free to grant or deny a passport at whim. They afford no basis for intelligent review by the courts. They furnish no meaningful guide for a citizen who wishes to maintain his liberty of travel or to regain it once the Secretary has withdrawn it. Such formulae permit no one possibly to know what conduct will render him ineligible for passport facilities. Neither petitioner nor anyone else can reasonably understand what he may or may not do lest he fall within the Kafkian net of involvement such criteria weave. Denial of liberty to travel on such ambiguous grounds, so vague and indefinite "that men of common intelligence must necessarily guess at . . . [their] meaning and differ as to . . . [their] application violates the first essential of due process of law". *Connally* v. *General Construction Co.*, 269 U.S. 385, 391; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445; *International Harvester Co.* v. *Kentucky*, 234 U.S. 216; *Collins* v. *Kentucky*, 234 U.S. 634; *Lanzetta* v. *New Jersey*, 306 U.S. 451; *Musser* v. *Utah*, 333 U.S. 95; *United States* v. *Cardiff*, 344 U.S. 174, 176.

That we do not have a criminal statute before us is of no moment. Here, too, where the fundamental liberty of travel is involved, ambiguous criteria are constitutionally

objectionable. Cf. *Small* v. *Amer. Sugar Refg. Co.*, 267 U.S. 233, 238-240. Indeed, since, as will appear (Point VI), infringement of petitioner's freedom of association is involved, such an infirmity is especially censurable. *Burstyn* v. *Wilson*, 343 U.S. 495; *Winters* v. *New York*, 333 U.S. 507; *Niemotko* v. *Maryland*, 340 U.S. 268; *Kunz* v. *New York*, 340 U.S. 290; *Staub* v. *City of Baxley*, *supra*.

It was these considerations, we assume, which led Judge Fahy to dissent below (R. 300-302). We doubt, however, that the standard with which he would replace the Secretary's—whether the issuance of a passport "would be likely to cause harm to national defense or to the conduct of foreign affairs" (R. 302)—is sufficiently precise to meet due process requirements. Moreover, when Judge Fahy suggests remand to the Secretary for reconsideration under the standard he would substitute, he disregards the rule, reflected in *Service* v. *Dulles*, 354 U.S. 363, which confines an administrator to the framework of his self-imposed regulations and requires that his action be tested on the grounds on which he in fact relied, not on others deemed appropriate by the courts. See *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80; *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196.

V.

The Denial Of A Passport To Petitioner Violates Due Process Because There Is No Rational Basis For The Secretary's Conclusions And Because His Decision Constitutes A Judgment Of Guilt By Association.

A. *There is no rational basis for the Secretary's conclusions that petitioner "is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully, of advancing that movement" and that issuance of a passport to him "would be contrary to the national interest."*

Assuming, *arguendo*, the propriety of the standards applied and the findings made, this record still discloses no rational basis for the Secretary's decision.

Seeking to comply with the ruling below on the first appeal of this case (*Dayton* v. *Dulles*, 237 F.2d 43), the Secretary, on remand, explicitly set forth four findings and, accompanying each, a statement referring to related confidential information, on which he purported also to base his decision (R. 275-278). It is within the framework of that recital that the passport denial must be judged; and if the recital affords no rational basis for the conclusions on which the passport denial is based, the Secretary's action cannot be sustained. Cf. *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 146.

We consider then each of the four findings which the Secretary made and the undisclosed information he deemed germane to each finding:

Finding I. The Science for Victory Committee

The Secretary finds that petitioner "was active in the Science for Victory Committee while at the University of California during 1943-44, serving as chairman of the organization during much of that period"; and that, as such, "he associated with Frank and Sandra Collins, and

Rose Segure, who had been instrumental in organizing" the Committee (R. 276). Relevant confidential information, says the Secretary, "indicates"[24] that the Committee "was conceived and organized by Communist Party officials as a front for propaganda and espionage activities", and that the Collinses and Segure were members of the Party at the time of their association with petitioner and the Committee (*ibid.*).

Assume the truth of these findings and the existence and accuracy of the undisclosed information. Equally, if not more, significant is what the Secretary fails to find. He nowhere suggests that petitioner ever *knew* that the Committee was organized by the Party or for improper purposes, or that the three named persons were members of the Party. Nor does he find that petitioner, or, indeed, the Committee itself ever *engaged* in Communist propaganda or espionage activities. On the contrary, petitioner testified that the Committee was not dominated by Communists: " . . . What policies it had were policies that partly originated with me and policies with which I agreed. And I was not a Communist. So my answer to . . . [the question whether or not the Committee was dominated by Communists is] 'No' . . ." (R. 83). And, further, that he did not "know of any members of the organization or people active in the organization whom I knew to be Communists" (R. 93). As to the Collinses, petitioner said: " . . . I do not know in the first instance of any information that would make me believe that . . . [they] were members of the Communist Party" (R. 81). Segure attended the Committee's meetings on only two or three occasions, and petitioner had not seen her since 1944; he had not seen Sandra

[24] We have heretofore noted the interesting contrast between the Secretary's use of the term "indicates" to characterize the undisclosed information related to Findings I, III, and IV (R. 276-277) and his use of the term "establishes" with reference to Finding II (R. 276). We deduce from this that the Secretary himself has considerable doubt as to the reliability of the information he relies on (see *supra*, p. 38).

Collins since 1946; and, since 1946, he had met Frank Co
lins casually and only twice, by accident, at a professiona
meeting and in his place of employment (R. 81, 82).

The affidavit which petitioner filed with the Passpor
Office and his testimony before the Board of Passpor
Appeals supply comprehensive accounts of the nature o
the Science for Victory Committee and his affiliation wit
it (R. 17-23, 72-85, 86-88, 90-93). The Committee was
loose *ad hoc* group of persons, constituted in the Sa
Francisco Bay area in 1943, which concerned itself pr
marily, if not solely, with the garnering of support fo
Senator Kilgore's Science Mobilization Bill (R. 73). It
activities were public, and it had no relationship whatev
with the Communist Party; during petitioner's associatio
with the group, no one suggested to him that it was in an
way Communist-inspired or Communist-dominated, or tha
Communists were members (R. 92-93). It is noteworth
that the organization has at no time been listed by th
Attorney General in connection with Government securit
orders or referred to, so far as we know, in any invest
gation of subversion.

Finding II. Alfred Sarant

The Secretary finds that "during the period 1946-195
at Ithaca, New York", petitioner "maintained a close ass
ciation and relationship" with Sarant; that, at petitioner
invitation, Sarant and his wife lived in his home for eig
months in 1947-1948, pending completion of the Sara
home next door; that, thereafter, petitioner and Sara
were neighbors until July, 1950; that, at that time, Sara
became the subject of intensive interrogation by the F.B.
shortly departed from Ithaca, and subsequently enter
Mexico with petitioner's wife (R. 276). Confidential i
formation, the Secretary advises, "establishes" that Sara
was "an active member of the Communist Party; that h
admitted membership during 1943 and 1944; and that "i
was involved in the espionage apparatus of Julius Rose
berg" (R. 276-277).

Here, again, what the Secretary fails to say is more eloquent that what he does say. Assume that Sarant was at one time a Communist Party member and involved in espionage. There is no finding that such activity was contemporaneous with petitioner's association with him or that petitioner was in the least informed of such activity. Petitioner met Sarant in 1946, several years after the alleged admitted membership, and their association terminated in mid-1950. During this short four-year span, petitioner was not aware, if it was a fact, that Sarant was attending Communist Party meetings or was a member of any Communist organization (R. 154). And since July, 1950, he has not seen or heard from Sarant or petitioner's former wife, with whom his erstwhile neighbor had run off (R. 34, 145). (Petitioner secured a decree of divorce in New York on September 1, 1954 (R. 39)).

Finding III. The New York City Apartment Building

The Secretary finds that petitioner "was present during 1949 and 1950, on more than one occasion", in the Morton Street [New York City] apartment building, in which Sarant "was lessee of apartment 6-I" (R. 277). In this connection, the Secretary states that confidential information "indicates that Sarant's apartment . . . was used by Julius Rosenberg and other members of his spy ring for the microfilming of classified United States Government documents which were ultimately transferred to a foreign power" (*ibid.*).

Once more, what is lacking in the Secretary's recital is most significant. Assume petitioner's presence in the building, on one or more occasions, during 1949 and 1950; and that Sarant's apartment there was used by the "Rosenberg spy ring" for espionage purposes. There is, however, not the slightest suggestion that *petitioner's* presence in the building, such as it may have been, was

for any improper purpose.[25] Or, at any time, in the company of Sarant, or Rosenberg, or any of the "other members of his spy ring". Or that petitioner's presence, if indeed he was ever in the building, coincided in time or even in calendar year with that of the Rosenberg group. Or that he ever *knew* or had reason to believe that the Sarant apartment was used by the Rosenberg group or for the unlawful activities alleged.

It must be kept in mind that petitioner has repeatedly and consistently denied, to the F.B.I., before grand juries, and ultimately throughout this proceeding, that he ever set foot even in the apartment building (except on one occasion, in 1951, when, at their request, he accompanied F.B.I. agents to that address) (R. 32, 103, 133-134, 369-370). The Secretary's contrary finding is based on the incredible testimony of the three custodial employees of the building called by the Board of Passport Appeals (R. 171-267).[26]

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[25] Note that the Secretary does not find, as was initially charged (R. 49), that petitioner was ever present in the Sarant apartment, as contrasted to the building. Nor does the Secretary specify on how many occasions or on what dates petitioner was present in the building. The vagueness of this finding suggests that the Secretary shares our view as to the unreliability of the testimony on which he halfheartedly relies (see *infra*, n. 26).

[26] Limitations of space do not permit a detailed analysis of that testimony. On a careful examination, we believe the Court will agree that the testimony is quite incredible and certainly affords no support for the denial of a fundamental liberty to a citizen of the United States.

The witness, Floyd C. Elwyn, is the only one who testifies that petitioner was present in the Sarant apartment: "sitting at the table, at a card table, in the living room. He was having crackers and milk . . ." (R. 175-176). On direct examination by Board counsel, Mr. Elwyn fixes the date of this incident in *September or October of 1950* (R. 175). On cross-examination, during which the chairman of the Board advised (or, to use the term preferred by the chairman, "encouraged") the witness to refuse to answer such questions as he might choose not to answer (R. 188), the witness confirms that date (R. 193-194, 206-207). Then, suddenly, after hours of testifying, we find him confessing error (R. 217-

Finding IV. Bernard Peters

Finally, the Secretary finds that petitioner, "an experienced physicist, has maintained a close association and relationship with one Bernard Peters"; that Peters was responsible for the offer of employment to petitioner at the Tata Institute in Bombay; and that one of his primary stated purposes in going abroad is to work in close collaboration with Peters (R. 277). Confidential information relevant here, says the Secretary, "indicates"

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218); the Board chairman interrupts the cross-examination and recesses the hearing to permit the witness "to refresh his memory" (R. 222-223); and, on his return, presumably "refreshed", Mr. Elywn promptly revises his chronology and now testifies that it was in *December, 1949*, that he saw petitioner in the Sarant apartment (R. 225-226). The witness further testifies that the very first time he ever saw petitioner in the apartment building (as distinguished from the Sarant apartment) was in September or October, 1949 (R. 217, 219, 236). After considerable and largely futile effort to clarify Mr. Elwyn's testimony, it becomes plain that his identification, for whatever it is worth, is based on only four alleged observations: on two occasions, the witness had "brushed by" petitioner in the hallways of the building; on the third occasion, he had observed him, at the card table, for about two or three minutes; and on the fourth occasion, in the basement corridor, again for only a few minutes (R. 244). This was in an apartment building housing approximately 350 people (R. 191). Yet, ignorant of petitioner's name, on the basis of such fleeting observations, he was prepared months later to identify petitioner from a photograph exhibited to him by the F.B.I. for a period of 30 seconds (R. 241, 244).

Mrs. Jean Elwyn, the wife of the first witness, testifies merely that she had observed petitioner on one occasion for a period of approximately five minutes, in the company of two other persons, in the basement area of the apartment building (R. 246-247, 252-253). She cannot fix the date of this incident, but thinks that it was some time in *January, 1950* (R. 247). When asked what it was about petitioner that had enabled her, months later, to identify him, she says that he was "rather small" (R. 253). She admits, however, that the F.B.I. photograph on the basis of which she made the identification was not a full length photograph but only that of a man's head (R. 254). When asked to explain what there was in petitioner's face that was striking, she replies: "There is nothing extraordinary about . . . [his features], just an average looking man in my estimation" (R. 253, 254). Mrs.

that Peters, "who recently renounced his American citizenship, has held membership in the Communist Party outside of the United States; has engaged in numerous Communist activities both in this country and abroad; and is suspected of being a Communist espionage agent" *(ibid.)*.

Again, there is no rational basis for the conclusions the Secretary reaches. Petitioner's research in India would

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Elwyn admits that she never was in the Sarant apartment and never knew anything about it (R. 250).

The third witness, Mr. Floyd Elwyn, Sr., is a man seventy-three years of age (R. 264). He likewise never saw petitioner in the Sarant apartment (R. 259). His testimony is vague, indefinite, and rambling. He saw petitioner somewhere between 1943 or 1944 and 1950; he cannot fix a more definite date (R. 255, 265-266). He puts him at various vague places: "in the entrance of the apartment building" (R. 255); "on one of the landings" (R. 256); "on Morton Street" *(ibid.)*; "in a Grocery Store on Hudson Street" *(ibid.)*. Yet, these incidents were most casual, and there was nothing about petitioner's actions which would have made the witness particularly remember him (R. 257). Indeed, the witness is so cooperative that he is prepared also to identify petitioner's attorney as a person he has seen before (R. 267).

How can any one be expected to do more than petitioner has done to meet these fantastic accusations? When he requested particulars from the Board of Passport Appeals, he was advised that the "information" in the State Department's files indicated his presence in the Morton Street building in July or August, 1949, and in the Sarant apartment during January, 1950 (R. 49). By testimony, affidavit, and documentary evidence, he accounts for his whereabouts during those months and demonstrates that, at no time during those periods, was he even in New York City, let alone the apartment building in question (R. 107-117, 133, 167-170). He calls another witness, Dr. Dale Corson, of Cornell University, to corroborate his proof with respect to January, 1950 (R. 119-124, 127-128). And, suddenly and belatedly, he is confronted with testimony of Mr. Elwyn which, if believed, would put him at the apartment building in September, October and December, 1949; with contradictory testimony of Mrs. Elwyn which would put him there in January, 1950; and with the vague, will-of-the-wisp story spun by the elder Mr. Elwyn, Sr., which would put him there some time between 1943 or 1944 and 1950! When may he expect the hurdy-gurdy to cease?

lie in the field of cosmic-ray, not thermonuclear, physics and would involve no secret or classified data at all (R. 72, 126, 128-129). Both petitioner and Dr. Corson, professor of physics at Cornell University, testified that there is absolutely nothing in the field of cosmic-ray research "which requires the use or which develops into the production . . . of secret or restricted or classified data" (R. 126, 129); "[t]here is no area of research that is more devoid of secrecy" (R. 72). There is no evidence to the contrary. Moreover, here, too, there is no suggestion that petitioner has ever known of Dr. Peters' alleged activities. To the contrary, petitioner testified: Peters "is known to me to be not a Communist. I feel very sure of that" (R. 80). "I cannot conceive of Bernard [Peters] as a member of the Communist Party. I do not know any person to whom 'following a line', Communist or otherwise, would be more alien and impossible." (R. 150) "I . . . have strong reason for believing [that Peters was] not [a member of the Communist Party]" (R. 150).

We have considered these four findings separately for convenience and clarity in presentation. We are prepared, of course, to view them in their entirety. Even in their totality, it should be plain to any reasonable person that the findings and the related undisclosed information afford no conceivably rational basis for the Secretary's conclusions.

In the court below, the Secretary deduced from these findings a "pattern of association" by petitioner (see Br. for Appellee, Appeal No. 13,176, pp. 25-26). We do not understand how a "pattern" (whatever that term may signify) can be woven from (1) an association with the Science for Victory Committee in 1943-1944, for a period of less than two years; (2) an association with Sarant, from 1946 to 1950; (3) presence in the Morton Street apartment building "on more than one occasion", in 1949

and 1950; and (4) friendship with Dr. Peters since 1938. In any event, such a "pattern of association", quite innocent so far as petitioner was concerned, however ingeniously it may be fabricated, cannot rationally lead to the conclusion that, in 1956, years later, petitioner's proposed trip to India was designed "to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement" and would be contrary to "the national interest". Cf. *Schware* v. *Board of Examiners*, 353 U.S. 232; *Konigsberg* v. *State Bar of California*, 353 U.S. 252.

If the Secretary has any power to restrain the movements of citizens, such restraint would be reasonable only insofar as it related to the purpose of travel. The political heterodoxy of an applicant's associations would be quite irrelevant. See *Schware* v. *Board of Bar Examiners*, *supra*; *American Communications Association* v. *Douds*, 339 U.S. 382, 391. Here, however, petitioner is barred from leaving the county solely because of his associations. Despite repeated requests, he has never been informed of the dangers against which restraint on his movement is purported to guard. There is no suggestion that he has ever engaged in illegal activity here or would engage in such activities abroad. Moreover, as indicated by Judge Bazelon, in his dissenting opinion in *Bricht* v. *Dulles*, *supra*, 248 F.2d at 587, legislation or regulations directed at the prohibition of travel in order to prevent illegal activities could be sustained only if narrowly drawn for that purpose. And even then, important constitutional questions would be presented by the Government's detention of citizens for preventive purposes rather than as a preliminary to criminal proceedings based upon indictment for past unlawful activities, and on suspicion alone and without evidence of guilt. No decision of this Court sanctions such a restraint.

B. *The Secretary's decision constitutes a judgment of guilt by association.*

The Secretary's findings in this case assume relevance only insofar as they reflect a judgment of petitioner's guilt by association. Patently that is just what the Secretary's decision amounts to. Whether or not the undisclosed information does in fact exist, whether or not it is reliable, whether or not it "indicates" or "establishes" what the Secretary says it does; there is, as we have indicated, not the slightest suggestion either (1) that petitioner ever knew or had reason to know of the alleged wrongful activities of his associates, or (2) that he himself at any point or to any degree ever engaged in any of the activities referred to. All the evidence of record is to the contrary.

What the Secretary has done, then, is to impute to petitioner, notwithstanding his complete innocence and lack of knowledge, misconduct ascribed to his associates. The decision of passport denial is posited not on petitioner's own activities, or knowledge, or state of mind; but instead on his innocent association with persons whose activities the Secretary finds culpable. Thus, we have here a flagrant application of the heinous doctrine of guilt by association, a doctrine alien to our traditions and constitutional principles and "one of the most odious institutions of history". *Joint Anti-Fascist Refugee Committee v. McGrath, supra*, 341 U.S. at 178 (Douglas, J., concurring).

Under our Constitution, such an official finding of vicarious guilt is impermissible. See *Schneiderman v. United States*, 320 U.S. 118, 136; *DeJonge v. Oregon*, 299 U.S. 353; *Herndon v. Lowry*, 301 U.S. 242. "[I]t is of the essence of the institutions of liberty that it be recognized that guilt is personal . . ." Memorial of Special Committee of Assoc. Bar City of New York (1920), largely written by Charles Evans Hughes, quoted in

O'Brian, *Loyalty Tests and Guilt by Association*, 61 Harv. L.R. 592, 594 (1948). See, also, Commager, *Freedom, Loyalty, Dissent* (1954) 93-134, *passim*.

The Secretary's decision of passport denial blatantly violates this Court's strictures in *Wieman* v. *Updegraff*, *supra*; *Schware* v. *Board of Examiners*, *supra*; and *Konigsberg* v. *State Bar of California*, *supra*. The indifference of the majority below to the need for *scienter* is irreconcilable with the opinion, joined in by the same judges, in the earlier case of *Briehl* v. *Dulles*, *supra*, 248 F.2d at 572: ". . . as we read the [passport] regulations, they refer to knowing associations with Communism." Here indeed is a glaring example of that "[i]ndiscriminate classification of innocent with knowing activity [which] must fall as an assertion of arbitrary power." *Wieman* v. *Updegraff*, *supra*, 344 U.S. at 191.

Here, too, it is significant that not a single person has testified that petitioner ever engaged in any unlawful activity or that the purposes of his proposed trip abroad are in any sense questionable. Cf. *Konigsberg*, *supra*, 353 U.S. at 729. Here, too, we are confronted with standards for official action which are "easily adapted to fit personal views and predilections, . . . a dangerous instrument for arbitrary and discriminatory denial" of constitutionally protected rights. *Konigsberg*, *supra*, 353 U.S. at 728. Here, too, there "is no evidence in the record which rationally justifies" the Secretary's conclusions. Cf. *Schware*, 353 U.S. at 760. Here, too, it may aptly be said: "A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the . . . [Secretary's] action". *Konigsberg*, *supra*, 353 U.S. at 734.

VI.

The Secretary's Decision Of Passport Denial Impairs Petitioner's First Amendment Rights And Violates The Principles Of Fairness Implicit In The Constitutional Inhibitions Against Bills Of Attainder And Ex Post Facto Legislation.

A. *The Secretary's decision impairs petitioner's First Amendment rights.*

Petitioner's rights under the First Amendment are clearly breached by the Secretary's passport denial in this case.

Three of the findings on which the Secretary bases his decision (R. 276-277) concern petitioner's associations with an organization (the Science for Victory Committee) and five persons, whose misconduct, in one manner or another, the Secretary deduces from confidential information in State Department files. Another, Finding III, (R. 277), speaks of presence in an apartment building; but it too becomes pertinent, if at all, only insofar as it reflects petitioner's association with "suspect" persons.

The freedom to indulge in such associations, however, are protected from Government restraint by the First Amendment. *Thomas* v. *Collins*, 323 U.S. 516; *DeJonge* v. *Oregon*, *supra*; see *Watkins* v. *United States*, *supra*; *Sweezy* v. *New Hampshire*, *supra*. Government officials may not determine who are good or bad associates. *West Virginia Bd. of Education* v. *Barnett*, 319 U.S. 624; *Thomas* v. *Collins*, *supra*, 323 U.S. at 545 (Jackson, J., concurring).

Beyond this, as this Court recently remarked, in *Watkins* v. *United States*, *supra*, 353 U.S. at 197-198, such restrictions are censurable not only because they affect the particular individual concerned but also because they effect a prior restraint on all citizens, forcing them to limit and modify First Amendment freedoms lest they suffer

a similar fate. The Secretary's action compels all citizens to be circumspect about the company they keep if they want freely to exercise their right to travel abroad. Since "everyone who expects to travel must so comport himself as to satisfy the notions of Federal bureaucracy about political ideas, associations and activities, control over travel . . . become[s] a powerful instrument for Federal control of thought." Commager, *Where Government May Not Trespass*, New York Times Magazine, March 24, 1957, at p. 32.

Even Congress may abridge First Amendment rights only in circumstances where "the gravity of the 'evil', discounted by its improbability, justifies such invasion . . . as is necessary to avoid the danger". *United States v. Dennis*, 183 F.2d 201,212 (C.A. 2), adopted in *Dennis v. United States*, 341 U.S. 494, 510. But here we are referred to no danger of any evil which can justify so radical a restraint on petitioner's freedoms.

Can it be seriously asserted that petitioner's research in India, in the completely unclassified, non-secret, and non-military area of cosmic-ray physics (R. 72, 126, 128-129) spells any danger to our national security and welfare? Is it rational to suggest that we must guard against petitioner's continued association and communication with his friend, Dr. Bernard Peters (see R. 277), particularly since there remains available to petitioner the international mails, an avenue of which we doubt even the Secretary would counsel suspension?

The rubrics coined by the Secretary to justify confinement of petitioner to this country—prevention of "advancement of the Communist movement" and "the national interest"—certainly furnish no persuasive justification for First Amendment invasion. As we have shown (Point IV), these are meaningless concepts, with respect to which, despite our persistent efforts throughout the four years of this exhausting proceeding, the Secretary has still to fur-

nish specification. Such tags, casually employed, are reminiscent of the considerations unsuccessfully advanced by the State in *DeJonge* v. *Oregon, supra,* to which Mr. Justice Black adverted in his dissenting opinion in *American Communications Association* v. *Douds, supra,* 339 U.S. at 453. They are certainly not those cogent considerations which will persuade the courts to sanction abridgement of First Amendment freedoms. See *Watkins* v. *United States, supra,* 354 U.S. at 205-206.

B. *The Secretary's action violates the principles of fairness implicit in the constitutional inhibitions against bills of attainder and retroactive penal legislation.*

The associations on which the Secretary here posits the passport denial (except possibly for the continuing relationship with Dr. Bernard Peters (R. 277)) predate even the promulgation of the Passport Regulations, in August, 1952. The brief association with the Science for Victory Committee occurred during 1943 and 1944 (R. 276); that with Sarant occurred during 1946 to 1950 *(ibid.)*; and the presence in the New York apartment building was "on more than one occasion" during 1949 and 1950 (R. 277).

To deprive petitioner of his freedom of movement on such a basis is clearly to do violence to those principles of fairness implicit in the inhibitions against bills of attainder and retroactive penal legislation embodied in Article I, section 9 of the Constitution. See *Ex parte Garland,* 71 U.S. 333; *Cummings* v. *Missouri,* 71 U.S. 277; *United States* v. *Lovett,* 328 U.S. 303; cf. *American Communications Association* v. *Douds, supra,* 339 U.S. at 412-415.

The Court's opinion in *Douds, supra,* is of particular interest. Holding section 9(h) of the Labor Management Relations Act of 1947 (29 U.S.C. 159(h)) not objectionable as a bill of attainder and *ex post facto* legislation, the Court considered it significant that members of the groups identified by that statute "are free to serve as union of-

ficers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in 9(h), is not a bar to resumption of the position" (339 U.S. at 414). *Lovett, Garland,* and *Cummings,* on the other hand, had emphasized "that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result" *(ibid.).*

But here, too, petitioner can do nothing to remove the proscription imposed on him. He obviously cannot turn back the clock and erase the past associations for which he is now being punished. The only course open to him (as indeed the former Director of the Passport Office informally suggested to his counsel) is to forego his proposed trip; in short, to abandon his right to travel and thus to accept the second-class citizenship proffered by his Government.[27]

VII.

The Secretary Had No Authority To Issue The Passport Regulations, Under Which A Passport Was Denied To Petitioner.

The decision of passport denial in this case was rendered under the provisions of the Passport Regulations, promulgated by the Secretary of State on August 28, 1952 (R. 278). (The pertinent provisions of those Regulations are set forth at p. 2, *supra* and pp. 77-84, *infra.*) The Secretary, however, had no authority to issue the Passport Regulations.

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[27] Which would mean that petitioner must also abandon any hope of working again in cosmic-ray physics, the area of science in which he has been educated and is highly skilled. For the stigmatization visited on him by the complex of these security proceedings has made it impossible now to obtain a post in that field in this country (R. 146-147). Thus, not only petitioner suffers; but the nation as well, at a time when we are confronted by a serious dearth of skilled scientists.

On this point, we adopt and respectfully refer the Court to Point II of the Argument in the Brief for Petitioners in *Kent and Briehl* v. *Dulles*, No. 481, this Term, which has been consolidated with the instant case (R. 304). We ask the Court's indulgence of this procedure so that needless repetition and expense may be avoided. In summary, our position on this point is, as follows:

A. *The claimed statutory authority*

(1) *22 U.S.C. 211a*

The Passport Regulations purport to find their source of authority in paragraph 126 of Executive Order No. 7856 (3 F.R. 681; 22 C.F.R. 51.77), issued under authority of section 1 of the Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. 211a. This statute, however, does not confer power to establish substantive categories of persons ineligible for passports. It was merely a reenactment, with minor provisions of the first passport Act enacted in 1856; and the limited purpose of both statutes was to centralize the passport function in the Department of State and to control the procedures of passport issuance. For almost one hundred years, the regulations promulgated pursuant to these statutes were of an administrative and routine nature. That Congress could not have intended these statutes to authorize control of travel in any respect is evident from the fact that passports were not required for lawful departure in peacetime either in 1856 or 1926, being then solely a convenience for the traveller. It was not until 1952 that the Secretary claimed that the 1926 statute authorized regulations of a substantive nature, by which he might establish classifications of citizens to whom passports would be refused.

The claim that the Passport Regulations are authorized by the 1926 statute would render it unconstitutional. For, the statute prescribes no standards whatever to guide the Executive in passport denials. Thus, if the Secretary's claim, that 22 U.S.C. 211a furnishes authority for his regu-

lations, is sustained; we have here an unconstitutional delegation of legislative power.

(2) *8 U.S.C. 1185*

The difficulties of justifying the Passport Regulations by reference to section 215 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185, are greater even than those which confront us under the 1926 statute.

First, the Passport Regulations themselves do not claim authority from this statute; they are rested exclusively on 22 U.S.C. 211a. The reason they did not refer to 8 U.S.C. 1185 is simple: at the time the regulations were issued, on August 28, 1952, 8 U.S.C. 1185 had not become effective, and there was no other statute in effect forbidding the departure of citizens without a passport. When the President invoked the authority granted by 8 U.S.C. 1185 (Proc. No. 3004, Jan. 17, 1953, 67 Stat. c. 31), although he confirmed certain other regulations of the Secretary, he made no reference whatever to the provisions here in question, *viz.* 22 C.F.R. 51.135-51.170.

Second, 8 U.S.C. 1185 contains no standards whatever for determining to whom passports should be denied and no grant of authority to the President or the Secretary to determine categories of citizens who may and may not receive passports. Thus, to claim authority for the Passport Regulations in that statute would again raise the serious question of an invalid delegation of legislative power.

B. *The conflict with the intent of Congress reflected in other legislation*

(1) *The Internal Security Act of 1950*

Several years before the Immigration and Nationality Act of 1952 was enacted, Congress had already established a class of citizens ineligible to receive passports.

Section 6 of the Internal Security Act of 1950, 64 Stat. 993, 50 U.S.C. 785, made it unlawful for a member of a "Communist organization" to apply for or use a passport, but only either after such an organization had registered under the Act or a final order of the Subversive Activities Control Board requiring such registration was in effect. To date, neither of such events has occurred. Moreover, the statutory proscription in any case would apply only to those who continued to remain members with knowledge or notice of such registration or final order. The Passport Regulations are patently in conflict with this statutory design. And the State Department has conceded as much; for it has repeatedly indicated that its regulations go beyond the 1950 statute. The Secretary is not authorized, by reference to "the spirit of the law", to issue regulations in anticipation and enlargement of the standards thus established by Congress.

(2) *The Expatriation Act of 1868*

As Judge Bazelon pointed out in his dissenting opinion in *Briehl* v. *Dulles*, 248 F.2d at 583, the Passport Regulations also conflict with the declaration by Congress, in the Act of July 27, 1868 (Expatriation Act of 1868), 15 Stat. 223, R.S. § 1999, affirming the right of expatriation as "a natural and inherent right of all people" and declaring any impairment thereof "inconsistent with the fundamental principles of this Government". Since expatriation today is virtually impossible absent departure from the country, the Passport Regulations conflict with the 1868 statute.

C. *The claim of inherent power*

The Secretary also has urged that, even without statutory authority, the Executive has inherent foreign relations power to deny passports on substantive grounds. The short answer to this contention is this Court's recent decision in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579. There it was held that Presidential power

"must stem either from an Act of Congress or from the Constitution itself" (at 585) and that, although the Constitution empowers the President to execute the laws, it grants him no law-making authority. The Passport Regulations plainly constitute an exercise of law-making authority. Furthermore, foreign relations powers are limited to matters such as the recognition of foreign governments and our relations with them. As the court below has stated, "The issuance of a passport is not the conduct of foreign affairs" (R. 300).

CONCLUSION

In refusing to issue a passport to petitioner, the Secretary of State has acted unjustly, arbitrarily, and unlawfully. Seeking to exercise his natural right to travel abroad, this citizen has been subjected to an intensive inquisition into his personal affairs and has been required to forego "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men". Under compulsion, he has made full disclosure and has repeatedly testified to facts which clearly remove him from the ambit of the classes of persons whom the Secretary, without legal authority, bars from travel abroad. Notwithstanding, petitioner still finds himself forbidden to travel. And this not by reason of any illegal activities in which he may have engaged. But solely because he has lawfully associated with persons whom the Secretary, on the basis of undisclosed information, brands as disloyal and subversive.

The Secretary's action in this case is in flagrant disregard of the constitutional rights of petitioner. Petitioner has been waiting almost four years now for the passport to which, as a citizen, he is entitled, and without which he is unable to enjoy his right to travel and to practice his profession and earn a livelihood in his chosen endeavor. It is time, we submit, that the grevious wrong he has suffered be redressed.

The judgment of the court below should be reversed and the case remanded to the District Court with directions to enter a judgment for petitioner as prayed for in the complaint.

Respectfully submitted,

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Attorney for Petitioner

February, 1958

APPENDIX

1. *22 U.S.C. 211a.* The Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. 211a provides, in pertinent part, as follows:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls, when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

2. *22 U.S.C. 212.* The Act of June 14, 1902, 32 Stat. 386, 22 U.S.C. 212 provides, in pertinent part, as follows:

> No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.

3. Section 215 of the *Immigration and Nationality Act of 1952*, 66 Stat. 190, 8 U.S.C. 1185, as codified, provides, in pertinent part, as follows:

> 1185. Travel control of citizens and aliens during war or national emergency—Restrictions and prohibitions on aliens.
>
> (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—
>
> (1) [There follow restrictions enumerated (1) through (7) not here pertinent.]
>
> * * * *

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

4. Title I, Section 6 of the *Internal Security Act of 1950*, 64 Stat. 993, 50 U. S. C. 785, as codified, provides, in pertinent part, as follows:

(a) When a Communist organization as defined in paragraph (5) of section 782 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

5. The Act of July 27, 1868 (*Expatriation Act of 1868*), 15 Stat. 223, R.S. § 1999 provides, in pertinent part, as follows:

Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the en-

joyment of the rights of life, liberty and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore . . . any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation is declared inconsistent with the fundamental principles of this government.

6. The pertinent sections of the *Administrative Procedure Act*, as codified, 5 U.S.C. 1001 seq., provide, in pertinent part, as follows:

§ 1004. Adjudications

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved . . . (4) the conduct of military, naval, or foreign affairs functions; . . .

• • • •

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall

consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. . . .

• • • •

§ 1006. Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision.

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

• • • •

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency

decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

§ 1007. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

• • • •

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

• • • •

§ 1009. Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

• • • •

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of any agency action. It shall

(A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of section 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

7. The *Passport Regulations* of the Secretary of State, as amended (22 C.F.R. 51.135-51.170), are as follows:

§ 51.135.—This section is reproduced at p. 2, *supra*.

§ 51.136* *Limitations on Issuance of passports to certain other persons.* In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a person

* Prior to the Secretary's amendment of January 18, 1956, 21 F. R. 336, this section read as follows:

"§ 51.136 *Limitations on Issuance of Passports to Persons Likely to Violate Laws of the United States.* In order to promote the national interest by assuring that the conduct of foreign relations shall be free from unlawful interference, no passport, except one limited for direct and immediate return to the United States, shall be issued to persons as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities while abroad which would violate the laws of the United States, or which if carried on in the United States would violate such laws designed to protect the security of the United States."

when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (1) violate the laws of the United States; (2) be prejudicial to the orderly conduct of foreign relations; or (3) otherwise be prejudicial to the interests of the United States.

§ 51.137. *Notification to persons whose passport application is tentatively disapproved.*—A person whose passport application is tentatively disapproved under the provisions of § 51.135 or § 51.136 will be notified in writing of the tentative refusal, and of the reasons on which it is based, as specifically as in the judgment of the Department of State security considerations permit. He shall be entitled, upon request, and before such refusal becomes final, to present his case and all relevant information informally to the Passport Division. He shall be entitled to appear in person before a hearing officer of the Passport Division, and to be represented by counsel. He will, upon request, confirm his oral statements in an affidavit for the record. After the applicant has presented his case, the Passport Division will review the record, and after consultation with other interested offices, advise the applicant of the decision. If the decision is adverse, such advice will be in writing and shall state the reasons on which the decision is based as specifically as within the judgment of the Department of State security limitations permit. Such advice shall also inform the applicant of his right to appeal under § 51.138.

§ 51.138. *Appeal by passport applicant.*—In the event of a decision adverse to the applicant, he shall be entitled to appeal his case to the Board of Passport Appeals provided for in § 51.139.

§ 51.139. *Creation and Functions of Board of Passport Appeals.*—There is hereby established within the Department of State a Board of Passport Appeals, hereinafter referred to as the Board, composed of not less than three officers of the Department to be designated by the Secretary of State. The Board shall act on all appeals under § 51.138. The Board shall adopt and make public its own rules of procedure, to be approved by the Secretary, which

shall provide that its duties in any case may be performed by a panel of not less than three members acting by majority determination. The rules shall accord applicant the right to a hearing and to be represented by counsel, and shall accord applicant and each witness the right to inspect the transcript of his own testimony.

§ 51.140. *Duty of Board to advise Secretary of State on action for disposition of appealed cases.*— It shall be the duty of the Board, on all the evidence, to advise the Secretary of the action it finds necessary and proper to the disposition of cases appealed to it, and to this end the Board may first call for clarification of the record, further investigation, or other action consistent with its duties.

§ 51.141. *Bases for findings of fact by Board.*— (a) In making or reviewing findings of fact, the Board, and all others with responsibility for so doing under §§ 51.135 to 51.143, shall be convinced by a preponderance of the evidence, as would a trial court in a civil case.

(b) Consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line will suffice, prima facie, to support a finding under § 51.135(b).

§ 51.142. *Oath or affirmation by applicant as to membership in Communist Party.*—At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.

§ 51.143.* *Applicability of Sections 51.137-51.142.*

---

* Prior to the Secretary's amendment of January 18, 1956, this section read, as follows:

"§ 51.143. *Applicability of Sections 51.135-51.142.* When the standards set out in § 51.135 or § 51.136 are made relevant

Except for action taken by reason of noncitizenship or geographical limitations of general applicability necessitated by foreign policy considerations, the provisions of §§ 51.137-51.142 shall apply in any case where the person affected takes issue with the action of the Secretary in granting, refusing, restricting, withdrawing, canceling, revoking, extending, renewing or in any other fashion or degree affecting the ability of such person to receive or use a passport.

RULES OF THE BOARD OF PASSPORT APPEALS

§ 51.151. *Organization of Board.*—The Secretary of State shall appoint a Board of Passport Appeals consisting of three or more members, one of whom shall be designated by the Secretary as Chairman. The Chairman shall assure that there is assigned to hear the appeal of any applicant a panel of not less than three members including himself or his designee as presiding officer, which number shall constitute a quorum.

§ 51.152. *Decisions of the Board.*—Decisions shall be by majority vote. Voting may be either in open or closed session on any question except recommendations under § 51.140, which shall be in closed session. Decisions under § 51.140 shall be in writing and shall be signed by all participating members of the Board.

§ 51.153. *Counsel to the Board.*—A Counsel, to be designated by the Secretary of State, shall be responsible to the Board for the scheduling and presentation of cases, aid in legal and procedural matters, information to the applicant as to his pro-

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by the facts of a particular case to the exercise of the discretion of the Secretary under § 51.75, the standards in §§ 51.135 and 51.136 shall be applied and the procedural safeguards of §§ 51.137-51.142 shall be followed in any case where the person affected takes issue with the action of the Department in granting, refusing, restricting, withdrawing, cancelling, revoking, extending, renewing, or in any other fashion or degree affecting the ability of a person to use a passport through action taken in a particular case."

tedural rights before the Board, maintenance of records and such other duties as the Board or the Chairman, on its behalf, may determine.

§ 51.154. *Examiner.*—The Board may, within its discretion, appoint an examiner in any case, who may, with respect to such case, be vested with any or all authority vested in the Board or its presiding officer, subject to review and final decision by the Board, but, an applicant shall not be denied an opportunity for a hearing before the Board unless he expressly waives it.

§ 51.155. *Chairman.*—The Chairman, or his designee, shall preside at all hearings of the Board, and shall be empowered in all respects to regulate the course of the hearings and pass upon all issues relating thereto. The Chairman, or his designee, shall be empowered to administer oaths and affirmations.

§ 51.156. *Prior administrative remedies.*—It is required that prior to petitioning for an appeal, an applicant shall (a) exhaust the administrative remedies available in the Passport Office, as set out in § 51.137, and (b) comply with the provisions of § 51.142, as a part of his application, if deemed necessary by the Passport Office.

§ 51.157. *Petition.*—An applicant desiring to take an appeal shall, within thirty calendar days after receipt of the advice of adverse decision by the Passport Office file with the Board a written petition under oath or affirmation which shall, in plain and concise language, refute or explain the reason stated by the Passport Office for its decision.

§ 51.158. *Delivery of papers.*—Petitions or other papers for the attention of the Board may be delivered personally, by registered mail or by leaving a copy at the offices of the Board at the address to be stated in the advice of adverse action furnished applicant by the Passport Office.

§ 51.159. *Notice of hearing.*—Applicant shall receive not less than five calendar days notice in writing of the scheduled date and place of hearing

which shall be set for a time as soon as possible after receipt by the Board of applicant's petition.

§ 51.160. *Appearance.* — Any party to any proceedings before the Board may appear in person, or by or with his attorney, who must possess the requisite qualifications, as hereinafter set forth, to practice before the Board.

§ 51.161. *Applicant's attorney.*—(a) Attorneys at law in good standing who are admitted to practice before the Federal courts or before the courts of any State or Territory of the United States may practice before the Board.

(b) No officer or employee of the Department of State whose official duties have, in fact, included participation in the investigation, preparation, presentation, decision or review of cases of the class within the competence of the Board of Passport Appeals shall, within two (2) years after the termination of such duties appear as attorney in behalf of an applicant in any case of such nature, nor shall any one appear as such attorney in a case of such class if in the course of prior government service he has dealt with any aspects of the applicant's activities relevant to a determination of that case.

§ 51.162. *Supplementary information to applicant.*—The purpose of the hearing is to permit applicant to present all information relevant and material to the decision in his case. Applicant may, at the time of filing his petition, address a request in writing to the Board for such additional information or explanation as may be necessary to the preparation of his case. In conformity with the relevant laws and regulations, the Board shall pass promptly and finally upon all such requests and shall advise applicant of its decision. The Board shall take whatever action it deems necessary to insure the applicant of a full and fair consideration of his case.

§ 51.163. *Hearings.*—The Passport file and any other pertinent Government files shall be considered as part of the evidence in each case without testimony or other formality as to admissibility. Such files may not be examined by the applicant, except

the applicant may examine his application or any paper which he has submitted in connection with his application or appeal. The applicant may appear and testify in his own behalf, be represented by counsel subject to the provisions of § 51.161, present witnesses and offer other evidence in his own behalf. The applicant and all witnesses may be cross-examined by any member of the Board or its counsel. If any witness whom the applicant wishes to call is unable to appear personally, the Board may, in its discretion, accept an affidavit by him or order evidence to be taken by deposition. Such depositions may be taken before any person designated by the Board and such designee is hereby authorized to administer oaths or affirmations for the purpose of the depositions. The Board shall conduct the hearing proceedings in such manner as to protect from disclosure information affecting the national security or tending to disclose or compromise investigative sources or methods.

§ 51.164. *Admissibility.*—The Board and the applicant may introduce such evidence as the Board deems proper. Formal rules of evidence shall not apply, but reasonable restrictions shall be imposed as to the relevancy, competency, and materiality of evidence presented to the Passport Office's stated reasons for its decision and/or to the application of § 51.135 or § 51.136 to applicant's case.

§ 51.165. *Argumentation.*—All argumentation shall be directed to the application of the passport regulations to the facts of the particular case. The Board will permit no oral argument or motions relative to the legality or propriety of the hearing or other procedures of the Board. Submission of such argument or motions will be confined to the filing of written briefs, objections, or motions to be made a part of the record. The Board will not undertake to consider any such motion or contention.

§ 51.166. *Privacy of hearings.*—Hearing shall be private. There shall be present at the hearing only the members of the Board, Board's Counsel, official stenographers, Departmental employees concerned,

the applicant, his counsel, and the witnesses. Witnesses shall be present at the hearing only while actually giving testimony.

§ 51.167. *Misbehavior before Board.* — If, in the course of a hearing before the Board, an applicant or attorney is guilty of misbehavior, he may be excluded from further participation in the hearing. In addition, he may be excluded from participation in any other case before the Board.

§ 51.168. *Transcript of hearings.* — A complete verbatim stenographic transcript shall be made of hearings by qualified reporters, and the transcript shall constitute a permanent part of the record. Upon request, the applicant and each witness shall have the right to inspect the transcript of his own testimony.

§ 51.169. *Notice of decision.* — The Board shall communicate the action recommended under § 51.140 on all cases appealed to it, to the Secretary of State. The decision of the Secretary of State shall be notified in writing to the applicant. Such notice shall be given the applicant as promptly as possible after his hearing before the Board.

§ 51.170. *Probative value of evidence.*—In determining whether there is a preponderance of evidence supporting the denial of a passport the Board shall consider the entire record, including the transcript of the hearing and such confidential information as it may have in its possession. The Board shall take into consideration the inability of the applicant to meet information of which he has not been advised, specifically or in detail, or to attack the creditability of confidential informants.

8. The pertinent portions of the regulations of the Secretary of State titled "Travel Control of Citizens and Nationals in Time of War or National Emergency", as republished at 22 F.R. 10836 (22 C.F.R. 53.1-53.7) provide, as follows:

* * * *

§53.2. *Limitations upon travel.* — No citizen of the United States or person who owes allegiance to

the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States . . . , unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in § 53.3.

§ 53.3 *Exceptions to regulations in § 53.2* . No valid passport shall be required of a citizen of the United States or a person who owes allegiance to the United States:

* * * * *

(b) When traveling between the United States and any country or territory in North, Central or South America or in any island adjacent thereto: *Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or in any island adjacent thereto * * *.

§ 53.5 *Prevention of departure from or entry into the United States.*—(a) Nothing in this part shall be construed as prohibiting the Secretary of State or his representative at a port in the United States from preventing the departure from or entry into the United States . . . of a citizen of the United States or a person who owes allegiance to the United States unless he bears a passport, card of identification, or other document of identity issued by or under authority of the Secretary of State, notwithstanding the fact he may be destined for or arriving from a place outside any such territory of the United States for which a valid passport is not required under the regulations in this part.

(b) Nor shall anything in the regulations in this part be construed as prohibiting the Secretary of State or his representative at a port in the United States from preventing temporarily the departure from or entry into the United States . . . of a citizen of the United States or a person who owes allegiance

to the United States, notwithstanding the fact that such person may bear a valid passport, card of identification, or other document of identity issued by or under authority of the Secretary of State or be destined for or arriving from a place outside any such territory of the United States for which a valid passport is not required under the regulations in this part.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 621

WELDON BRUCE DAYTON, *Petitioner*,

v.

JOHN FOSTER DULLES, Individually and as Secretary of State of the United States, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF FEDERATION OF AMERICAN SCIENTISTS AND AMERICAN JEWISH CONGRESS AS *AMICI CURIAE*

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BRIEF OF FEDERATION OF AMERICAN SCIENTISTS AND AMERICAN JEWISH CONGRESS AS *AMICI CURIAE*

QUESTIONS PRESENTED

The record before the Court presents a number of possible questions for decision. The *amici curiae* consider that one question is of crucial importance to our democratic society, and it is on that question that they especially wish to make their views known to the Court. That question is:

Whether the Secretary of State can have the power, consistent with the requirements of procedural due process of law, to deny a passport to a citizen of the United States on the basis, in whole or in part, of confidential information unrevealed to the citizen or the courts.

STATEMENT

The case involves a judgment of the United States Court of Appeals for the District of Columbia dated October 24, 1957, affirming a judgment of the district court denying a motion of the petitioner for a summary judgment and granting the respondent's motion for summary judgment and dismissing the complaint. The complaint sought, among other things, judgment declaring the petitioner is entitled to a passport, and an injunction restraining respondent from continuing to deny petitioner's passport and directing respondent to issue a passport to petitioner forthwith.

In his brief in the lower court, petitioner set forth a detailed statement of his version of the facts and to this respondent replied with an even more detailed counter-statement. From the point of view of the interest of the *amici curiae*, most of the facts so set forth by the parties are not of controlling importance. To us the facts which are significant are as follows:

Petitioner Dayton is a research physicist. On March 5, 1954 he applied for a passport, stating the purpose of his trip to be the acceptance of a three-year appointment as a research physicist at the Tata Institute of Fundamental Research in Bombay, India. After a tentative refusal, an informal hearing and the submission of further sworn documents by the petitioner,

the Passport Office of the Department of State refused to issue a passport to him and he appealed to the Board of Passport Appeals. Proceedings were held on two occasions before the Board; petitioner testified at length under oath on one such occasion. The Board made a recommendation to respondent, the nature of which was not revealed to petitioner. On September 7, 1955, respondent informed petitioner that after receiving the recommendation of the Board of Passport Appeals, and after "a review of the entire record", he had disapproved petitioner's request for passport facilities "under § 51.135 of the Passport Regulations".

Petitioner filed suit and as one of the consequences thereof, on October 5, 1956, the Secretary of State for the first time rendered a formal Decision and Findings in petitioner's case. In such findings respondent disclosed that his decision was based in substantial part on (1) confidential information contained in the files of the Department of State, the substance but not the "sources and details" of which it is alleged were disclosed to petitioner, and (2) "other confidential information contained in the files of the Department of State", as to which neither sources, details nor substance was disclosed.[1] As to (1) he stated that such

[1] As the petitioner herein has indicated in a very important footnote, it is stated in the majority opinion below that "The Secretary disclosed . . . the substance of this confidential information", implying that the substance of *all* the information relied upon by the Secretary was revealed to petitioner. This statement in the opinion is clearly erroneous. See Petition herein, p. 12, footnote 4. The court's confusion may stem from statements in a brief of the appellee below in which it is alleged that the petitioner was informed of the substance of the confidential information used against him; this is coupled with an argument that in so doing the Secretary's action was consistent with a recommendation of the Com-

confidential information "relates to the internal security of the United States" and that in his judgment "to disclose publicly the sources and details of this information would * * * be detrimental to our national interest by compromising investigative sources and methods and seriously interfering with the ability of * * * [the State] Department and the Executive Branch to obtain reliable information affecting our internal security" and, moreover, "would have an adverse effect upon * * * [their] established relationships in the security and intelligence area." He stated as to (2) that any disclosure "might prejudice the conduct of United States foreign relations" and that disclosure of sources and details "might * * * prejudice the interest of United States foreign relations." The Secretary concluded that he had "reason to believe, on the balance of all the evidence, that the applicant is going abroad to engage in activities which will advance the Communist movement, for the purpose, knowingly and wilfully of advancing that movement". This conclusion was stated to be based upon the findings and the related confidential information (the substance but not the sources and details of which was disclosed) "as well as [the] other confidential information" (neither the substance, sources nor details of which were revealed). Petitioner's application was accordingly denied under § 51.135(c) of the Regulations, "and because the issuance of a passport would be contrary to the national interest."

On October 10, 1956, petitioner filed a motion for summary judgment in the district court and respond-

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mission on Government Security that in passport cases the principle of confrontation might safely be relaxed so long as the substance of confidential information was disclosed. See Brief of Appellee below in response to Brief of *Amicus Curiae*, p. 10.

ent countered with a cross-motion. The Secretary's motion was granted and the complaint was dismissed, the district court ruling that "under the circumstances of this case, the manner and use of confidential information accord with both procedural and substantive due process." A division of the Court of Appeals affirmed the district court's judgment, one judge dissenting.

THE INTEREST OF THE *AMICI CURIAE*

The Federation of American Scientists (FAS) is a non-profit organization of scientists who have associated themselves together for the collective expression of their views on public issues where the opinions of scientists are relevant, issues which affect science or with reference to which the experience or perspective of scientists may be a useful guide. Membership in the original organization comprised approximately 90% of the technical personnel at the various Manhattan District research centers. The present membership numbers over 2200, almost all of whom are scientists, engineers, mathematicians and medical research personnel. The organization also includes a small proportion of non-scientists interested in the aims and purposes of the group.

When FAS was formed at the end of World War II, it stated its basic aim as the meeting of "the increasingly apparent responsibility of scientists in promoting the welfare of mankind and the achievement of a stable world peace." The preamble of its Constitution contains the following:

"We Therefore Hold These Aims:

1. In the particular field of atomic energy, to urge that the United States help initiate and per-

petuate an effective and workable system of world control based on full cooperation among all nations.

2. In consideration of the broad responsibility of scientists today, to study the implications of any scientific developments which may involve hazards to enduring peace and the safety of mankind.

3. To counter misinformation with scientific fact, and especially, to disseminate those facts necessary for intelligent conclusions concerning the social implications of new knowledge in science.

4. To safeguard the spirit of free inquiry and free interchange of information without which science cannot flourish.

5. To promote those public policies which will secure the benefits of science to the general welfare.

6. To strengthen the international cooperation traditional among scientists and to extend its spirit to a wider field."

It is the objectives set forth in the paragraphs numbered 4 and 6 which prompted FAS to intervene in this litigation.

From its inception, the group has given serious study to the effects of travel restrictions on the interchange of scientific and cultural ideas and on the reputation of the United States abroad. It has been most seriously concerned with any policy or law which might have the effect of isolating American science and thought by restrictions on movement across the borders of the United States.

Because of these interests, the Federation has followed the course of the present case. It appears to

FAS that the implications of the questions presented by this appeal transcend any impact the decision may have on the petitioner. The determination of these questions will directly affect what may well be a substantial group of passport applicants, among whom are many persons falling in the same general category as the membership of the Federation. It is their view that restrictions on the international travel of such persons have effects on the advancement of science and knowledge which cannot be overstressed.

The American Jewish Congress, a national organization established in 1918, is committed to the dual, and for it inseparable, purposes of promoting the creative survival of the Jewish people and of securing and extending American democracy. The special concern of the Jewish people in human rights derives from an immemorial tradition that proclaims, under the highest sanctions of faith and human aspiration, the common and inalienable rights of all men. The American Jewish Congress has therefore always been unequivocally opposed to communism, fascism and all other forms of totalitarianism. Together with all Americans who prize the blessings of freedom they have repeatedly affirmed their readiness to make those personal and collective sacrifices reasonably calculated to safeguard our democracy. But they have likewise insisted that our nation's security is not enhanced when we resort to measures that violate the essential liberties whose preservation is our basic purpose.

The Congress submits this brief as one of the *amici* because it is convinced that the fundamental procedural protections of our heritage, which it has been well said are the very essence and substance of liberty, are subverted if the Secretary of State is permitted to re-

strict the liberty of American citizens by denying them passports to travel abroad upon information furnished by accusers unknown and unconfronted.

In filing this brief, both *amici* act with the consent of petitioner and the Solicitor General of the United States.

SUMMARY OF ARGUMENT

The right of a United States Citizen to leave the country is a basic right. It is an incident of national citizenship and an attribute of personal liberty. Today, and in the foreseeable future, control over exit from the United States is accomplished by the machinery for issuing passports. As a basic right, the right to travel abroad can be regulated only by due process of law. This is conceded by the court below. We differ with the court, however, on what constitutes procedural due process in restricting liberty to travel—the principal question here of interest to us. We believe that the Secretary of State does not have the power, consistent with procedural due process, to deny a passport to a citizen of the United States on the basis, in whole or in part, of confidential information unrevealed to the citizen and the courts.

The right restricted is an extremely important one. Petitioner, a research scientist, seeks a passport in order to engage in unclassified cosmic ray research at the Tata Institute in India. Respondent has denied him a passport, and if this denial is not set aside petitioner will have lost all opportunity to contribute anything to the studies being conducted at the Institute.

This case is a striking example of how restrictions of individual liberty to travel have an adverse impact

upon the interchange of ideas in professional and scholarly fields. The same restrictions have the same kind of impact on international understanding. These adverse impacts, we submit, may harm our national security, as well as restrict the liberty of the individual. Such restrictions on personal liberty cannot be allowed to stand unless it is clear beyond dispute that they can only help and not hurt the larger national interest used to justify them. There is no such convincing demonstration here.

The record makes it clear that in denying petitioner a passport, respondent acted in part upon information never disclosed in any way—even by substance or summary of the information or indication of the inferences drawn therefrom. By admitting this, respondent concedes that the "hearing" accorded to petitioner did not satisfy the fundamentals of due process and was a sham. Therefore, petitioner's liberty has been restricted without a hearing.

The only understandable reason assigned by respondent for his action is that to disclose all the information upon which he relied in denying petitioner a passport would compromise investigative sources and methods. In a comparable situation, this reason was rejected by the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester*, 227 F. 2d 708, as being inconsistent with due process. In our view, the precise procedural due process point raised here was squarely decided in *Parker*. The court below made no attempt to distinguish this case, and the distinctions suggested by the government are unsound.

Although this Court has in other cases lent some comfort to the government's insistence that it must be

protected against compromise of its investigative sources and methods, no decision of this Court has ever gone so far as the government now urges it to go in sustaining restriction of the liberty of a citizen on information supplied by faceless informers. We believe that none of the cases in which some curtailment of hearing rights has been countenanced is persuasive authority for permitting restriction of a citizen's liberty to travel without a hearing affording the fundamentals of due process.

Once it is concluded that the Constitution requires that passport applicants be given a due process hearing, the provisions of the Administrative Procedure Act would take hold. The foreign affairs function exemption does not apply to passport denial proceedings.

We agree with the conclusion of petitioners in the instant case, and in the companion cases of *Briehl* and *Kent* v. *Dulles,* No. 481, that respondent's passport regulations are not properly authorized by law. The constitutional arguments we have raised should be taken into account in construing his power to grant or deny passports narrowly. Whether on constitutional or on construction of power grounds, it is clear that the judgment below should be set aside.

ARGUMENT

I. IN DENYING PETITIONER A PASSPORT RESPONDENT DEPRIVED HIM OF AN ADMITTED BASIC RIGHT WITHOUT GRANTING HIM FUNDAMENTALS OF PROCEDURAL DUE PROCESS OF LAW TO WHICH HE IS ENTITLED

Respondent will probably concede, as he did below, that passport applicants are entitled to procedural due process. But it is safe to assume that he will qualify this by urging that such due process is a flexible con-

cept which varies with the subject matter and with the necessities of the situation. With this general proposition we can agree. But we strongly disagree that its specific application to this case supports respondent's claim that reasons of internal security, plus some other grounds only vaguely related to procedural considerations, give the blessing of procedural due process to the Secretary's acting upon undisclosed information. We feel that that argument does violence to the concepts set forth in the very cases relied upon by the Government below. It is our firm view that proper application of the expressed views of this Court compels a conclusion diametrically opposed to that urged on behalf of the Secretary of State.

A. The importance of the interest that has been adversely affected

The interest involved here is the freedom to cross the boundaries of the United States, with all that such freedom implies. Many years ago this Court said in *Williams* v. *Fears*, 179 U.S. 270, 274:

> "Undoubtedly, the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty."

The validity of this statement is attested to by over 700 years of Anglo-Saxon history. When King John signed Magna Carta at Runnymede on June 15, 1215, the 42nd Article included a provision that:

> "It shall be lawful, for the time to come, for any one to go out of our Kingdom, and return safely and securely, by land or by water, saving his allegiance to us * * *."

Later Blackstone wrote that "personal liberty consists in the power of locomotion, of changing situation,

or moving one's person to whatsoever place one's own inclinations may direct." See *1 Blackstone's Commentaries* 134. The right to move freely about the world was most recently affirmed in the Universal Declaration of Human Rights, Article 13, Paragraph 2, which provides that:

> "Everyone has the right to leave any country, including his own, and to return to his country."

As a signatory to that Declaration, the United States pledged itself to support it, in the words of its preamble, "as a common standard of achievement for all peoples and all nations."

In the three-judge court decision in *Bauer* v. *Acheson,* 106 F. Supp. 445, *Williams* v. *Fears* was relied upon and the court went on to state:

> "While the Supreme Court was there [in Williams v. Fears] considering freedom to move from state to state within the United States, it is difficult to see where, in principle, freedom to travel outside the United States is any less an attribute of personal liberty. Especially is this true today, when modern transportation has made all the world easily accessible and when the executive and legislative departments of our government have encouraged a welding together of nations and free intercourse of our citizens with those of other friendly countries. Personal liberty to go abroad is particularly important to an individual whose livelihood is dependent upon the right to travel, as is claimed by the plaintiff in this case." (106 F. Supp., at 451).

The right to leave this country is in the same category as the right to "move freely from state to state" which

has been described as "an incident of national citizenship." *Edwards* v. *California*, 314 U.S. 160, 178.

It is in this context that the function of a passport must be considered. Today and in the foreseeable future, its primary use is as a control over exit from the United States and entry into foreign countries. A denial of a passport is a denial of exit and there can be no doubt that the denial of exit is a restriction of liberty in every sense. The distinction between restriction to a jail, to a city, to a state or to a nation is merely one of degree. In *Walker* v. *Chief Quarantine officer*, 69 F. Supp. 980 (D. C. Canal Zone 1943), it was held that a United States citizen was being deprived of his liberty in violation of the Fifth Amendment when he was prevented from leaving the Canal Zone after having complied with all laws and regulations.

The interest here involved is a most fundamental and important one. It goes far beyond the mere convenience of the petitioner. The failure to protect that interest in this case, as the facts demonstrate, can result in the destruction of the passport applicant's livelihood. It is a substantial and basic personal interest which should not be lightly regarded or cavalierly brushed aside. Even more, the denial of that interest can result in serious interference with the advancement of knowledge. This, too, is vividly demonstrated by the facts in this case.

Petitioner is a research physicist. He seeks a passport in order to be able to accept a three-year appointment to engage in cosmic ray research at the Tata Institute in Bombay. Cosmic rays fall upon all parts of the world; their existence has been known for some 50 years and their study has provided us with a great

deal of useful information concerning the nature of the elementary particles which make up the world in which we live. Their study can in no way be regarded as secret. In fact, during World War II this is one of the few fields of physics in which results were regularly published freely in German, American and Russian journals alike. The Tata Institute is the leading research institute in India. Its head, Dr. Hami J. Bhabha, is one of the world's most distinguished theoretical physicists and was president of the International Conference on the Peaceful Uses of Atomic Energy held in Geneva, Switzerland, in August 1955. None of the work carried out at the Institute is classified. As in all scientific research, it is impossible to predict what will be the results of the studies being carried on at the Tata Institute or what the petitioner's participation in those studies might contribute. What is perfectly clear is that if the petitioner is denied a passport, he will have lost all opportunity to contribute anything to those studies, and any advancement of knowledge in this field that might result from his contributions will have been lost.

Thus, the restriction of liberty to travel in this concrete case works its stifling effect upon scientific advance and the growth of knowledge. Restrictions of liberty to travel in general tend to have an adverse impact upon the interchange of ideas in medical, cultural, sociological, and other professional and scholarly fields, as well as upon international understanding. The value to increased international understanding in these critical times which the Secretary of State himself places upon the relaxation of travel restrictions is dramatically underlined by the recently announced agreement between the United States and the Soviet

Union for the reciprocal dropping of travel restrictions and encouragement of wider interchange of tourists, newsmen, and technical and other visitors between our two countries. *Washington Post*, January 28, 1958, p. 1. The effect in a single case is serious enough, but the cumulative effect of these restrictions imposed by the Secretary is even more serious—and, by restricting the advance of knowledge and international understanding, may in the end, we submit, inflict untold harm upon the very interest in whose name they are invoked, our national security. Unless it is clear beyond dispute that such restrictions of personal liberty can only help and not hurt the larger national interest used to justify them, they cannot stand. There is here no such convincing demonstration.

B. The manner in which petitioner was deprived of his right to travel

Respondent deprived petitioner of his liberty by denying him a passport, and the record makes clear that in doing so he relied in part upon information as to which neither substance, sources, nor details were revealed, a procedure contrary to all our traditional notions of a fair hearing. Moreover, it appears that the ultimate source and reliability of some, at least, of the undisclosed information was unknown even to the Secretary himself. (See Petition herein, p. 12, footnote 1).

When respondent Secretary admits that he relied upon undisclosed information in denying petitioner's application for a passport, he is admitting that petitioner was not afforded an opportunity to inspect and refute information which influenced his decision, and he is admitting that petitioner was not informed of the

identity of certain informants, whether they testified under oath, nor whether their testimony was based upon hearsay. He is also admitting that petitioner was denied an opportunity to confront and cross-examine informants whose information was accepted as relevant and material. In making these admissions, respondent in effect concedes that the hearing afforded to petitioner was a sham. "There is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain or refute." *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 93.

Petitioner has, therefore, been deprived of his "liberty" without a hearing. The fact that the government purports to have determined petitioner's case by means of what it terms a formal "hearing" is not conclusive when it is plain that the basic requirements of due process have not been observed. Moreover, once the Secretary devises an administrative procedure which purports to accord a "hearing", he cannot break the promise implicit in the appearance of fairness by holding a "hearing" that does not accord with fair play. He cannot "shelter himself behind the appearance of legal procedure". Frankfurter, J., dissenting, in *Jay* v. *Boyd*, 351 U.S. 345, 372.

C. Respondent's reasons for depriving petitioner of his right to travel without granting him a hearing

If we look to the Secretary's findings we find two reasons stated for his reliance on confidential information. One is to further national security by avoiding "compromising investigative sources and methods"; the other is to avoid prejudicing "the conduct" or

"the interest of United States foreign relations." *How* the disclosure of all the evidence against petitioner might prejudice our foreign relations is not revealed by the findings—and is impossible for us to conceive. The mere statement of the conclusion should carry no more weight than would the formulae of "interference with the use of the Commerce power" or "compromising the conduct of the Post Office" as a basis for restricting personal liberty on undisclosed evidence. In any event, we submit it requires too much conjecture to to be given conclusive weight against a claim of personal liberty.

We are left, then, with the protection of sources and investigative methods as the sole understandable reason assigned by the Department of State for deciding passport denial hearings on the basis of confidential information not revealed to the citizen.

This was also the reason relied upon by the government in *Parker* v. *Lester*, 227 F. 2d 708 (9th Cir.), and it is our view that the issue of procedural due process presented here is precisely the same as that raised and decided against the government in that case. The present case involves a determination of the procedural rights of a passport applicant who needs a passport to get a job. *Parker* involved the question of the procedural rights of a seaman who needed a specially validated merchant mariner's document to enable him to follow his calling. That the two cases are practically counterparts is demonstrated by the fact that the Passport Regulations of the Secretary of State exempt the travel of any seaman from the requirement of the possession of a passport if he possesses a "specially validated United States merchant mariner's document issued by the United States Coast Guard," 22 C.F.R.

§ 53.3(c). It is that very document of clearance which was at stake in *Parker* (see *Parker* v. *Lester*, 98 F. Supp. 300, 304), and it is in effect a seaman's passport.

The regulations under which seamen were screened provided that no person might be employed on a merchant vessel of the United States unless in possession of a validated document issued by the Commandant of the Coast Guard indicating his "security clearance" following a "security check" which "satisfied [the Commandant] that the applicant's character and habits of life are [not] such as to authorize the belief that the presence of the person aboard vessels of the United States would be inimical to the security of the United States." *Parker* v. *Lester*, 112 F. Supp. 433, 437. As in the case of passports, an initial denial of clearance was made *ex parte*. After such denial, the regulations provided for hearings first before a local appeals board and then before a national appeals board. At an interim stage of the program the local boards were one-man boards; later they were tripartite. The course of the administrative proceedings is well described in the opinion of the District Court:

> "The mechanics of the determination on the basis of which the petitioners' appeals were denied merit some attention. Pursuant to the requirement set forth in the regulations that a person denied clearance must be informed of the 'general basis' for such denial, a form letter was sent to each petitioner advising him that '* * * this finding is based on the belief that you are affiliated with, or sympathetic to an organization, association, group, or combination of persons subversive or disloyal to the Government of the United States'. The procedure during the actual hearing varied from case to case, a pronounced difference being however noticeable between the prac-

tice of the interim and that of the tripartite board. Thus, petitioner Kulper, appearing before a tripartite board, was informed of and questioned at length by the examiners concerning specific instances of alleged misconduct about which the board had information. Kulper managed to persuade the board that he was not a security risk. On the other hand, the procedure before the interm one-man board was epitomized by the case of petitioner Parker. At the outset, Parker was informed that he was believed to be a member of the Communist Party and that the burden was on him to clear himself. He categorically denied such membership and then was conducted by his attorney through an aimless exploration of his background and associations, at the conclusion of which, the examiner, despite counsel's urging, declined to address any questions to petitioner. Parker was not cleared. In no proceeding before an appeals board did witnesses appear against a petitioner, thus depriving him of an opportunity for cross-examination, nor was he ever shown the file containing the information on which the Coast Guard acted. The board members, themselves, had no personal knowledge of the reliability and veracity of the informers and had to rely on the degree of creditability which a governmental investigative agency accorded such sources of information." 112 F. Supp. 433, at 439.

This procedure the District Court found to be unlawful, stating that:

"* * * no reason appears why the Commandant could not apprise petitioners of the basis for his initial determination with such specificity as to afford them reasonable notice and an opportunity to marshal the evidence in their behalves. The same is true of the conduct of the examination by the Board. While it may not be feasible to reveal

> to petitioners the source of the evidence against them, no reason appears in common sense and respondents' argument why petitioners should not be informed of the contents of the testimony. Thus a bill of particulars should be furnished upon demand and petitioners should be given an opportunity to rebut specific allegations of misconduct or other acts and associations which the board considers probative." 112 F. Supp. at 444.

In the actual framing of the decree, the District Court enjoined further administration of the seaman screening program unless a more specific statement of the basis for the initial determination was furnished the seaman "to be worded with such specificity as to afford the seaman reasonable notice of the said basis and an opportunity to marshal evidence in refutation thereof." 227 F. 2d, at 711. The decree also permitted a seaman to demand a bill of particulars from the appeals board but provided "that such bill of particulars need not set forth the source of such data, nor disclose the data with such specificity that the identity of any informers who have supplied such allegations or data will necessarily be disclosed to the said seaman or to other persons." 227 F. 2d, at 711.

This qualification the Court of Appeals for the Ninth Circuit held to be unjustified. It ponted out that as a practical matter it gave "the Coast Guard carte blanche to withhold substantially any information the officials may choose to keep from the seaman". 227 F. 2d, at 722. The Court further held that the regulations denied the plaintiffs due process of law and directed that an injunction restraining their enforcement against the plaintiffs be issued. A decree in absolute terms was issued and upon

further appeal was upheld by the Court of Appeals. 235 F. 2d 787.

From this account it will be seen that in *Parker* v. *Lester* the precise procedural due process point raised here was squarely decided. Moreover, it was decided with the full attention of the Court focused on the role of the "confidential informant". It is difficult indeed to understand the attempt of the respondent in his brief below to distinguish *Parker* "on the ground that the regulations there involved expressly placed an absolute bar on the disclosure of the source of *all* information and the identity of *all* informants—with no qualifications as to their relationship to national security." (Brief of respondent as Appellee below, p. 50). As we have seen, the Court of Appeals for the Ninth Circuit made a careful analysis of the District Court's decree and directed that *all qualifications* on the disclosure of the evidence against the plaintiffs be removed. Had the court wished to sustain a qualification authorizing suppression of information affecting the national security, it may be assumed that it would have done so. But even if the court in *Parker* v. *Lester* had so restricted its holding, it would afford respondent little comfort here because his passport regulations provide for non-disclosure of information even when national security is *not* involved. It is true that § 51.137 of the Passport Regulations provides that a person whose application is tentatively disapproved shall be notified of the reasons "as specifically as in the judgment of the Department of State security considerations permit." But another section (§ 51.163 —which appears in the section on Rules of the Board of Passport Appeals) provides: "The Board shall con-

duct the hearing proceedings in such manner as to protect from disclosure information affecting the national security *or tending to disclose or compromise investigative* sources or methods." (Italics added). § 51.170 provides that in reaching its conclusion "the Board shall consider the entire record including * * * such confidential information as it may have in its possession."

These rules make it obvious that the information which is kept confidential and not disclosed to passport applicants goes beyond that which affects the national security and expressly includes any information "tending to disclose or compromise investigative sources or methods." And in the instant case the Secretary's findings, though artfully worded, are more consistent with the latter reason for withholding the confidential information than with the former. Section VI of the findings states: "To disclose publicly the sources and details of this information would, in my judgment, be detrimental to our national interest *by compromising investigative sources and methods* and seriously interfering with the ability of this Department and the Executive Branch *to obtain reliable information affecting our internal security.*" (Italics added)

It is to be noted that nowhere does the Secretary state that the particular confidential information undisclosed to petitioner in the present case "affects the national security". He says only that disclosure would "compromise investigative sources and methods" and interfere with the Department's ability "to obtain reliable information affecting our internal security". This seems to say only that the alleged compromise of investigative sources and

methods will *in the future* interfere with getting *other* information affecting our internal security. However valid a concern this may be for government investigators or for the Secretary, it is plainly not of the same magnitude of concern as the disclosure of confidential information which *per se* would affect national security. Thus, even if the latter might be sustained against petitioner's claim of an unfair hearing, it does not follow that the former must be.

The language of the passport regulations permitting the Secretary the alternative of withholding information "tending to disclose or compromise investigative sources or methods", which he appears to have adopted in this case, covers the same ground as was covered by the language of the District Court's decree in *Parker* v. *Lester* which the Court of Appeals held should be stricken from the decree as an unjustified qualification. Here the wording is "information * * * tending to disclose * * * investigative sources"; there it was "data * * * disclose[d] * * * with such specificity that the identity of * * * informers who have supplied such allegations or data will necessarily be disclosed." Although some of the words used are different, the plain meaning is the same—and so are the legal consequences. What was a violation of procedural due process in the seamen screening program is equally a violation of procedural due process in the passport denial program. A physicist should not be confined to the country any more than a seaman unless all the evidence against him is revealed.

It is worth noting that the court below made no attempt to distinguish *Parker* v. *Lester;* that troublesome

shade was put to rest by ignoring its existence. Perhaps the court did so in part because it had difficulty following the government's attempts to distinguish *Parker*. In one of its briefs as appellee below, an attempt is made to distinguish cancellation of a seaman's certificate from refusal to issue a passport. (Brief of Appellee below in response to Brief of *Amicus Curiae*, p. 3, footnote 2.) It is argued that denial of a passport to petitioner does not destroy his livelihood as revocation of a seaman's certificate does by excluding the seaman from his chosen field. But petitioner chooses to go to India to pursue work in his field there. To suggest that he must choose a different place to follow his profession would be equivalent to saying that a barred seaman's livelihood is not destroyed because he can choose to get a different type of work.

It was also urged below that the condemnation by the court in Parker of the use of confidential information was of a "limited nature", with a quotation from the opinion referring to the possible sustaining of future regulations "which in some degree qualify the ordinary right of confrontation and cross-examination of informers" (*Id.*, p. 6). The short answer to this possibility of a possibility is that here the right of confrontation is qualified completely out of existence. That the petitioner confronted and cross-examined three witnesses (as the government is so fond of proclaiming) is irrelevant to the fundamental issue here that *other* witnesses on whose information the Secretary in part admittedly based his decision were never identified or confronted, nor even the substance of their information revealed to petitioner.

D. The precedents in this Court do not sustain respondent's action

The attempt of the government here to protect itself against compromise of its investigative sources and methods is not unprecedented or unique, and it must be conceded that the Court has paid some heed to the government's plea that its confidential informants be protected. But it is clear that in no case has this Court ever gone so far as it is now urged to do in sustaining restriction of the liberty of a citizen on information supplied by faceless informers. It is equally clear that some decisions of this Court and of other courts in this area must, in the light of subsequent opinions of this Court, be regarded as no longer controlling, or even persuasive.

In *Bailey* v. *Richardson*, 182 F. 2d 46, (D. C. Cir. 1950), the Court of Appeals for the District of Columbia Circuit, one Judge dissenting, upheld the use of confidential informants in loyalty cases involving government employees. The decision was affirmed here by an equally divided court. To the degree that *Bailey* is not distinguishable (as we think it is because it was considered to involve the right to government employment, not general liberty), it must nevertheless be regarded as having been drained of vitality by subsequent decisions and developments. The *Bailey* case, as this Court said recently of another decision, "is one of those cases that cannot be understood except in its peculiar setting; even then it seems highly unlikely that a similar result would be reached today." *Reid* v. *Covert*, 354 U.S. 1, 10.

That case was decided in 1950, at a time when widespread anxiety and public concern had been inspired by the outbreak of war in Korea, by the disclosure that the Soviet Union had perfected atomic weapons, and by the trial of Alger Hiss. In announcing its decision, the Court of Appeals emphasized that it could not "ignore the world situation" which "presently exist[s]" (182 F. 2d, at 64). At the time of the *Bailey* decision the loyalty program was still in its infancy, and it had not become fully evident that it would be "used to victimize perfectly innocent men". (*Parker* v. *Lester, supra*, 227 F. 2d, at 720). It is now apparent that sufficient experience had not accumulated at the time of the decision to permit adjudication based on full information as to the far-reaching consequences of the ruling.

Since that time, the reasoning of the Court of Appeals in *Bailey* has been rejected by this Court in other cases. The *Bailey* decision cannot be fairly reconciled with *Roviaro* v. *United States*, 353 U.S. 53, which held that it was prejudicial error to withhold the identity of a confidential informant from a defendant charged with a narcotics violation, nor with *Jencks* v. *United States*, 353 U.S. 657, where this Court held that in a criminal prosecution, the government cannot suppress certain types of documents relevant to the prosecution which may tend to exculpate the defendant. And the same Judge who wrote the majority opinion below in the instant case recently wrote for a unanimous court (on this point) in *Communist Party* v. *Subversive Activities Control Board* (U.S. Ct. App., D.C. Cir.), decided January 9, 1958, that "simple justice, the fundamentals of fair play" re-

quire the production of material FBI reports as "one of the fundamentals of fair play required in an administrative proceeding" where the informant's credibility as a witness is attacked. The court there said:

> "The opinion of the Supreme Court in the *Jencks* case, as we read it, is based upon the elementary proposition that the interest of the United States is that justice be done. The same elementary proposition applies here and leads to the same result."[2] (Slip Opinion, pp. 20-1).

In weighing the value of *Bailey* as a precedent, it should be noted that other recent decisions of this Court pronounce a constitutional philosophy adverse to the claim that the alleged exigencies of the "cold war" may be relied upon to justify intrusions upon personal liberty. Among these are *Watkins* v. *U.S.*, 354 U.S. 178, *Sweezy* v. *New Hampshire*, 354 U.S. 234.

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[2] To the extent that Judge Prettyman may be said to require disclosure of confidential information as essential to the fundamental fair play of *procedural* due process in the quoted case but not in the instant case, we submit that the distinction is untenable. For the opinion below admits that the right to travel is a part of liberty requiring due process protection, that it cannot be arbitrarily denied, that the issuance of a passport is "not the conduct of foreign affairs", and that a "hearing" is required. Yet it upholds the Secretary's determination that "disclosure would adversely affect *our internal security or the conduct of our foreign affairs*" (italics added) as a sufficient basis for denying the disclosure which in the *Communist Party* case was required as one of the "fundamentals of fair play" in a proceeding directly affecting our internal security because of "the elementary proposition that the interest of the United States is that justice be done". It would seem equally elementary and fundamental that the Secretary be required either to disclose his confidential information in a proceeding where he is *not* conducting foreign affairs or to preserve his confidences for the conduct of foreign affairs and not use them to deny petitioner a passport.

and *Schware* v. *Board of Bar Examiners*, 353 U.S. 232. Against this subsequent background of decisions in this Court, *Parker* v. *Lester* now appears all the more valid in its holding that a citizen of the United States may not be deprived of constitutionally protected liberty without an opportunity to understand and meet the charges against him and to face and question those who supply the information relied upon to support the deprivation.

None of the other cases involving personal liberty in which this Court has sanctioned some curtailment of normal hearing benefits has gone as far as respondent urges here. *Shaughnessy* v. *U.S., ex rel. Mezei*, 335 U.S. 206, involved the issue whether the United States could exclude an alien without notice and a hearing, and this Court held, four justices dissenting, that it might. In doing so, however, the majority opinion was careful to point out that the result turned on the fact that a non-resident alien was involved. Even aliens, it was stated, are entitled to due process if they are residents of the United States. That decision is hardly a precedent for restricting the liberty of an American citizen without the fundamentals of fair hearing.

United States ex rel. Knauff v. *Shaughnessy*, 338 U.S. 537, and *Jay* v. *Boyd*, 351 U.S. 345, likewise involved the question of the rights of aliens to hearings, and in the latter case the majority opinion noted that it was not even claimed that a constitutional issue was presented. See 351 U.S. at 357, footnote 21.

Knauff involve an alien excluded from the United States, and the majority stressed "that an alien who

seeks admission to this country may not do so under any claim of right." 338 U.S., at 542. Even there 3 of 7 participating Justices dissented, and Mr. Justice Jackson's warning against the dangers to real security in the use of secret evidence applies forcefully here:

> "Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from * * * [the alien's] admission is as nothing compared to the menace to free institutions inherent in procedures of this pattern. In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected."

In *Jay* v. *Boyd* the alien complaining was found deportable and the question before the court involved the procedure on his application for the completely discretionary relief of suspension of deportation. The majority said that "In view of the gratuitous nature of the relief, the use of confidential information in a suspension proceeding is more clearly within statutory authority than were the regulations involved in the *Knauff* and *Mezei* cases." (p. 359). At the same time it was recognized "that a resident alien in a deportation proceeding has constitutional protections * * * [which] may militate against construing an ambiguous statute as authorizing the use of confidential information in a deportation proceeding." (*Ibid.*) *A fortiori*, a

citizen's larger constitutional protections militate against the use of such information in a proceeding to obtain a basic right which is being denied to him.

The dissenting views in that case, accordingly, appear to us to be entitled to even greater weight on the stronger facts of this case. The Chief Justice referring to undisclosed confidential information, said (p. 362):

> "Such a hearing is not an administrative hearing in the American sense of the term. It is no hearing * * *. To me, this is not due process. If sanction of this use and effect of 'confidential' information is confirmed against this petitioner by a process of judicial reasoning, it may be recognized as a principle of law to be extended against American citizens in a myriad of ways."

The conscientious objector cases are also clearly distinguishable. *United States* v. *Nugent*, 346 U.S. 1, and *Simmons* v. *United States*, 348 U.S. 397, held that under the Selective Service Act, pursuant to which the Department of Justice is required to hold hearings on appeals for draft exemption by alleged conscientious objectors, a registrant was not entitled to examine the FBI report of his background and reputation for sincerity regularly furnished to the Department's hearing officer, but that he was entitled to a resumé of such report. The field of compulsory military service is the only one in which this Court has countenanced the use of resumés in place of confrontation, but even here the Court has been careful to limit its holding by requiring, in a companion case to *Simmons*, that a copy of the recommendation made by

the Department of Justice to the Appeals Board must be made available to the registrant. *Gonzales* v. *United States*, 348 U.S. 407. In any case, the field of selective service under the war power marks the extreme to which this Court has gone in permitting administrative action based upon undisclosed information. It is an extreme which can be justified, and indeed was expressly justified, only as an "exercise of the war power" by means of a statute "calculated to function in times of peril." *United States* v. *Nugent, supra*, at 9. As the opinion of this Court in *Falbo* v. *United States*, 320 U.S. 549, demonstrates, courts will be slow to countenance "litigious interruption of the process of selection [of inductees] which Congress created." (p. 554).

As approached by the Court, the precedents in the conscientious objector cases are hardly persuasive in the field of passport denial. The war power commands the ultimate sacrifice of the individual rights of all to the overwhelming and pressing demand of the nation to preserve itself. No such overwhelming and pressing demand of national self-preservation can be urged by respondent for drafting a few selected individuals to remain in the country without according them the opportunity to persuade him that his informants are wrong, as faceless informers have been known to be, and that in fact the nation's interest and knowledge may even be advanced by their travel. Moreover, the conscientious objector seeks relief from an obligation imposed on all, under claim of a statutory, not a constitutional, right. The passport applicant seeks a constitutional liberty accorded to all but denied to him.

The papers in the present case and the opinion below are searched in vain for a convincing demonstration of any substantial good accomplished by the suppression of evidence here. The real implication of the government's argument is that anonymous informers must be protected at almost any cost. Whatever the sincerity of those who make this plea, on the basis of what is before us we can only conclude that what is sought primarily is not so much protection of the national security itself as of particular investigative measures which have been adopted in its name.

II. THE ADMINISTRATIVE PROCEDURE ACT APPLIES TO PASSPORT PROCEEDINGS

Amici curiae are aware that it may be urged that any argument involving the Administrative Procedure Act is beyond the scope of the questions presented by the petition for *certiorari* granted in the instant case. The petition does, however, squarely raise the question of procedural due process, and it appears to us that a serious question as to the APA flows inevitably from the due process point. For if this Court holds that the Constitution requires that passport applicants be given a due process hearing, the provisions of the APA apply unless one of the exemption provisions makes them inapplicable, under *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. *Amici curiae*, therefore, urge that the following argument be considered under the "plain error" exception in paragraph 1(d)(2) of Rule 40 of this Court.

The court below accepted the proposition that due process of law must be observed in passport denial proceedings, and it seems clear that the "hear-

ing" which respondent purported to give to petitioner was granted under the compulsion of this principle. The court below also expressly rejected any idea that in processing applications for passports, the Secretary of State is fulfilling a foreign affairs function. In *Shachtman* v. *Dulles*, 225 F. 2d 938 (1955), the Court of Appeals for the District of Columbit Circuit had stated:

> "We must not confuse the problem of appellant's application for a passport with the conduct of foreign affairs in the political sense, which is entirely removed from judicial competence. For even though his application might be said to come within the scope of foreign affairs in a broad sense, it is also within the scope of the due process clause, which is concerned with the liberty of the individual free of arbitrary administrative restraint. There must be some reconciliation of these interests where only the right of a particular individual to travel is involved and not a question of foreign affairs on a political level." (p. 944).

These views were reaffirmed in the opinion below, the court adding:

> "The issuance of a passport is not the conduct of foreign affairs. The Secretary does not have unfettered discretion in respect to it—nor does he claim it." (Slip Opinion, pp. 10-1).

Indeed, it would appear that under *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, if the issuance of passports were considered to be within the area of foreign affairs, the action of the Secretary in denying a passport would be immune from any judicial review whatever.

It follows, therefore, that the exemption provisions in Sections 4 and 5 of the Administrative Procedure Act, excluding from the reach of that statute rule-making and adjudications "to the extent that there is involved any * * * foreign affairs function of the United States" or "the conduct of * * * foreign affairs functions," do not apply to the denial of passports and give respondent no comfort here. There appears to be no middle ground between concluding either that the Secretary of State is not subject to judicial review at all in passport denial proceedings or that his passport procedures are subject to the requirements of the Administrative Procedure Act.

Since no claim is made that any attempt was made to conform to the requirements of that Act, it follows that the Secretary's denial of petitioner's application for a passport was invalid and should be set aside.

CONCLUSION

On the issue of procedural due process the question here is whether a citizen has been given a due process hearing before his admitted basic liberty to travel is restricted, where faceless informers are used to support the restriction. Whatever else a due process hearing may be held to require for this purpose, it is plain that there is no hearing of a dignity to safeguard constitutional liberty where the citizen has no notice of what the confidential information is that is relied upon to deny him his freedom and no opportunity to test the credibility of his accusers or to rebut the evidence which they have presumably presented against him.

It is worth emphasizing that the citizen is not here seeking administrative relief or benefit—he is pursuing an administrative process purporting to accord a hear-

ing, only because his government has restricted his liberty by confining him in the country to the extent that its law requires a passport for him to leave it. But whichever way it is viewed—as the equivalent of a criminal proceeding leading to imprisonment, or as an administrative proceeding leading to a restriction of liberty, the expressed views of this Court impel the conclusion that reports of confidential informants relied upon by the government against the citizen accused must be made available to him, as a matter of fairness, to prepare his defense or reply. No less than this is due process unless we have already yielded our liberty in order to defend it against those whom we would not imitate.

The foregoing argument assumes power in the Secretary to issue or deny passports on an individual basis—which *amici curiae* do not for a moment admit. We are informed that petitioners in the instant case and in the companion cases of *Briehl* and *Kent* v. *Dulles*, No. 481, are urging upon this Court that respondent's passport regulations are invalid because they were not authorized by Congress and because power to issue them could not be delegated by the President since no such power is inherent in his office. We agree with that conclusion. We have not included argument specifically on that point in our brief because we have nothing to add to what will be before the Court on the narrow issue of executive power and statutory construction.

Amici curiae feel, however, that the arguments we have raised above should be taken into account in construing Congressional intent. Construing the pertinent statutes as granting to respondent the power

he claims will require, as we have demonstrated, that grave constitutional questions be faced. Under familiar principles such questions are, whenever possible, avoided by a narrower construction that does not raise constitutional problems. This Court followed that course in a parallel situation in *Peters* v. *Hobby*, 349 U.S. 331. There, in response to the complaint of the petitioner that he was denied any opportunity to confront and cross-examine secret accusers in a government loyalty proceeding, this Court stated that this issue "if reached by the Court, would obviously present serious and far-reaching problems in reconciling fundamental constitutional guarantees with the procedures used to determine the loyalty of government personnel." (p. 338). In his broad dissent in *Briehl* below, Judge Edgerton spelled out fully the reasons which impelled him to such a course there (248 F. 2d 561, 597):

> "The Secretary proposes to continue restricting the personal liberty of a citizen because statements by informants whom the Secretary does not identity have led him to think that if the citizen goes abroad he will do something, the nature of which the Secretary does not suggest, which the Secretary thinks, for reasons known only to him, will be contrary to what, for reasons known only to him, he conceives to be 'the national interest'. If Congress or the President had undertaken to authorize this, serious constitutional questions would arise. May the government deprive a citizen of his constitutional liberty to go abroad (1) without a jury trial, (2) without a definite standard of guilt, (3) without sworn testimony, and (4) without an opportunity to confront his accusers or know their identity? May it deprive him of

this liberty because of the way he has exercised his First Amendment rights of free speech, press, and assembly? Since neither Congress nor the President has undertaken to give the Secretary the authority he claims, we need not consider these constitutional questions."

Moreover, as we have shown, the construction urged by the Secretary of his power to deny passports probably would require that the broad procedural obligations specified in the Administrative Procedure Act be imposed on him. Since the State Department has no quasi-judicial functions except for passport adjudications, it is ill-equipped to meet such obligations—and their imposition as well as grave constitutional questions will be avoided by the narrow construction of the Secretary's power contended for by petitioners and fully set forth in Judge Bazelon's dissent in *Briehl*. (248 F. 2d, at 579).

Whether on statutory construction or constitutional grounds, it is clear that the judgment below should be set aside.

Respectfully submitted,

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February, 1958.

APR 7 1958

Supreme Court of the United States

October Term, 1957

No. 621

WELDON BRUCE DAYTON,
Petitioner

v.

JOHN FOSTER DULLES, individually and as Secretary of State of the United States,

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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The Government now concedes that the citizen's right to travel abroad—and thus to a passport requisite to such travel—is a fundamental right, subject only to restraints which accord with due process (*Kent and Briehl* v. *Dulles*, No. 481, Gov't Br. 26-27). Consequently, aside from the question of the Secretary of State's authority to deny passports at all on political grounds, absent which authority the denial here cannot stand (see Gov't. Br. 32): the principal issues remaining in this case are whether the Secretary's determination as to petitioner violates due process, unlawfully abridges his rights under the First Amendment, or contravenes the constitutional inhibitions against bills of attainder and ex post facto legislation.

As to the question of the Secretary's authority, we have adopted the views of petitioners in No. 481. As to our

argument that the Secretary's decision impairs petitioner's First Amendment rights and violates the principles implicit in the constitutional provisions prohibiting bills of attainder and ex post facto legislation (Pet. Br. 63-66), the Government's response (Gov't. Br. 105-106) needs no extensive reply. It is sufficient to note that whatever justification there may be for approving limitations on First Amendment rights in cases of Communist Party membership (see Gov't. Br., No. 481, pp. 97-100), petitioner here has never been a member of or even affiliated with that Party, and there is no finding to the contrary. The passport denial in this case was grounded solely on associations clearly within the ambit of the First Amendment guarantees, and was plainly designed to preclude petitioner from engaging in associations and activities likewise within the protection of that Amendment. The Secretary's action in this case is therefore clearly in violation of the First Amendment.

We shall hereafter consider in this reply brief solely the issues presented under the Due Process Clause.

The Government's argument that there has been no violation of petitioner's rights of due process rests on a conception by which those rights are so devitalized that they lose all significance as safeguards against governmental usurpation. In our view, the Government's brief not only lays bare the grave breaches of due process which have characterized this proceeding. By its many gratuitous glosses on the record, the brief affords a further example of the disregard for the fundamental principles of fairness which are the essence of due process.

1. ***The absence of any rational connection between the Secretary's findings and his conclusions.***

We have argued (Pet. Br. 52-60) that the undisclosed information on which the Secretary purported to rely and his findings, even if one were to assume their accuracy,

could still not afford a reasonable justification for the conclusions he reached; that is, that petitioner "is going abroad to engage in activities which will advance the Communist movement for the purpose knowingly and wilfully, of advancing that movement" and that issuance of a passport to him "would be contrary to the national interest (R.278). The Government offers two answers to this argument, neither of them tenable.

First, says the Government, "it must be assumed" that the body of completely undisclosed information referred to in paragraph V of the Secretary's decision (R. 278) "is sufficient to overcome whatever possible hiatus there may possibly be between the findings and information set forth in paragraphs I-IV [R. 276-277]", on the one hand, and his conclusions, on the other (Gov't. Br. 56). For, since the Secretary has said that this paragraph V "information may not be disclosed for reasons relating to foreign policy as opposed to internal security", the Government suggests that "it would not be unreasonable to assume that the undisclosed information relates more directly to the purpose of petitioner's proposed travel abroad to India—i.e., to the ultimate conclusion—than to the past events encompassed by the prior findings" (*ibid.*).

Second, even if the paragraph V undisclosed information is ignored, the Government argues that "it would . . . have been permissible for the Secretary to have concluded, on the basis of the evidentiary findings and related confidential information . . . [set forth in paragraph I-IV of his decision], considered in the light of the 'serious doubts' . . . as to petitioner's credibility raised by the testimony in the open record, that petitioner wished a passport in order to engage in the type of activities described in the Secretary's conclusion" (Gov't. Br. 57). This follows, according to the Government, because it "is not unreasonable . . . to infer" that his past activities and associations "are not the wholly unrelated and innocent facts which petitioner contends they are, but instead are linked by the

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common thread of petitioner's close connection with the Communist movement" (*id.* 58); and because petitioner's repeated staunch denial that he ever was present at the New York City apartment building referred to in paragraph III (R. 277) in the face of the contrary testimony in that regard raised "serious doubts" as to his general credibility, sufficient to cast doubt on his "protestations of innocence with regard to his other activities and associations; to strengthen the adverse conclusions inferable from the composite of those activities and associations; and to support an inference that, if petitioner would falsify his testimony in this important matter during the consideration of his passport application, he would use the passport in furtherance of Communist activities" (*id.* 59-60).

The first answer which the Government advances is startling in its audacity. If the Government may fill all lacunae in the Secretary's decision from this bottomless well of nebulous information referred to in paragraph V of the decision,[1] it has succeeded in inventing a most convenient technique for resolving practically all substantive due process problems. Apparent illogic in governmental action may thus alchemically be converted to reason by the simple expedient of resort to a body of secret information which the Government may plead it cannot reveal for reasons of state. Such legerdemain would obviously drain the Due Process Clause of much, if not all, of its vitality.

Moreover, it is plain that the Government is here engaging in the sheerest surmise. As we have noted, the Secretary has furnished not the slightest indication of what the paragraph V information may concern. The suggestion that it relates to the purpose of petitioner's travel

[1] It is undisputed that the Secretary has not afforded even the slightest glimmer of what this paragraph V information may be or to what it may relate (see Gov't. Br. 76, fn. 40).

comes for the first time in the Government's brief in this Court. Thus, at this late stage, the Government would seek arbitrarily to amend the agency decision under review.

If the paragraph V information is related to the purpose of petitioner's travel, why did the Secretary himself not say so? To have stated as much and no more could certainly have breached no confidence. If this formula is to be proffered as the cure-all for each of the deficiencies in the Secretary's decision, surely the Court and petitioner were entitled to have had it come from the Secretary himself, not from his counsel. It is the Secretary's decision as he rendered it which is in issue here, not his lawyers' belated gloss on it.[2]

The Government's second answer, which, without regard to the paragraph V information, seeks to establish a rational nexus between the findings and recitals embodied in paragraphs I-IV of the decision and the Secretary's conclusions, likewise rests on mere conjecture and hypothesis. Whatever the Government's brief may suggest as to permissible inferences, the fact is, as we have pointed out in our main brief (pp. 53-59), that the Secretary himself never suggested, let alone found, that pet-

[2] That the Secretary's lawyers themselves do not really know any more than we what the paragraph V information relates to is apparent not only from their need to resort to supposition but also from the paradox to which, as they recognize, their assumption gives rise. For, "if the Secretary had information in the foreign relations area showing that petitioner's proposed travel was for the purposes stated", it would follow that "there was no need for the extensive consideration of petitioner's past" (Gov't Br. 56, fn 30). In an effort to extricate itself from this paradox of its own making, the Government again falls back on supposition: "it *would appear* that the information . . . *must have been* information which would be significant in relation to petitioner's travel only *if* there were reason to believe that petitioner had been engaged in Communist activity in the past" (*ibid.*, emphasis supplied). But, as is clear from the record (see *infra*, p. 6), the Secretary has never said that he believed that petitioner had ever been engaged in such activity.

tioner had any "close connection with the Communist movement" or that his activities or associations were any other than the "unrelated and innocent facts" which petitioner contended and testified they were (see Gov't. Br. 58). Nor is there an iota of evidence in the record which would support such a finding. Let us reiterate: (1) The Secretary has not found that he had reason to believe that petitioner ever knew that the Science for Victory Committee was organized by the Communist Party or for Communist propaganda, espionage, or other improper purposes; or that the three named persons associated with that Committee were members of the Party; or that petitioner or even the Committee ever engaged in Communist propaganda or espionage activities. (2) The Secretary has not found that he had reason to believe that Sarant's Communist or espionage activities (if such there were) were contemporaneous with petitioner's association with him; or that petitioner was in the least informed of such activities. (3) The Secretary has not found that he had reason to believe that petitioner's presence in the New York City apartment building (which he has steadfastly denied) was for any improper purpose, or in the company of or coincidental in time with the presence of Sarant and the Rosenberg group; or that petitioner knew or had reason to believe that the Sarant apartment was used for the unlawful activities alleged. (4) The Secretary has not found that he had reason to believe that petitioner has ever known of Dr. Bernard Peters' alleged Communist activities (if such there were).[3]

[3] The Secretary stated that confidential information "indicates" that Dr. Bernard Peters, with whom petitioner desired to work at the Tata Institute in India, "has held membership in the Communist Party outside of the United States; has engaged in numerous Communist activities both in this country and abroad; and is suspected of being a Communist espionage agent" (R. 277). In this connection, it may be worthy of note that we have just been informed that Dr. Peters has been invited to participate in experimental researches at the Institute of Theoretical Physics in Copenhagen, Denmark for the coming academic year.

In short, these characterizations of petitioner, his associations, and his activities, with which the Government's brief is so generous (see, e.g., pp. 28, 57, fn. 30, 58, 64), are supported neither by evidence of record nor by the Secretary's decision itself. Again, we submit that if the Secretary had reason to believe that petitioner's associations and activities were other than innocent, *the Secretary* should so have stated; it is *his* determination, not his lawyers' supposition of what that determination might have been, that is here in question.

The Government's brief makes much of the "serious doubts" as to petitioner's "general credibility" expressed by the Secretary (R. 278) because of the conflict between petitioner's testimony and that of the three custodial employees, with respect to petitioner's presence on "more than one occasion" in 1949 and 1950 in the New York City apartment building (Gov't. Br. 58-61). The emphasis in the Government's brief in this regard is far greater than was the Secretary's. It is significant that notwithstanding his professed doubts as to petitioner's "general credibility", the Secretary explicitly grounded three of his four findings on petitioner's "own statements" (paragraph I, R. 276; paragraph II, R. 276; paragraph IV, R. 277). Indeed, an examination of the record will demonstrate that petitioner's frank and comprehensive testimony is the *only* information which supports these three findings. Such reliance is hardly consonant with "serious doubts" as to petitioner's "general credibility."[4]

[4] We may pause to consider whether there was any justification for these professed doubts. Petitioner has repeatedly denied to the F.B.I., before two grand juries, and throughout this proceeding that he ever set foot in the apartment building in question (except on one occasion, in 1951, when he accompanied F.B.I. agents, at their request, to that address) (R. 32, 163, 193-134, 369-370). We believe that the contrary testimony of the three custodial employees (R. 171-267) is unreliable; and so apparently did the Federal law-enforcement officers, for none of these three was called as a witness before the grand juries which considered the matter (R. 181, 253, 265). Whether their testimony was cred-

There is every good reason why the Secretary himself never suggested that the paragraph V information relates to petitioner's purpose in travel abroad or that petitioner's associations and activities were any other than innocent. As to the purpose of petitioner's travel, the record is clear: except for the incidental pleasure of the voyage *en route*, petitioner wishes to go to India to accept an appointment at the Tata Institute to engage in cosmic ray physical research (R. 6, 12). He has unequivocally disavowed any other purpose (R. 12, 160). And, throughout the four exhausting years of petitioner's travail in the State Department and the courts, the Secretary has yet to specify any other purpose. The only reasonable conclusion is that the Secretary knows of none; that, consonant with his responsibility, he cannot specify such other purpose because neither confidential nor other information discloses any. As to the character of petitioner's associations and activities, the record is likewise plain: there is not a scintilla of evidence that petitioner himself ever engaged in any Communist or espionage activities or that he knew that the organizations and persons with whom he associated engaged in such conduct. Here, again, the Secretary, cognizant of his responsibility, has not found petitioner guilty of such conduct, because he knows of none, neither confidential nor other information disclosing any such conduct.

Consequently, the rationale of the Secretary's decision, unembroidered by the fanciful suppositions supplied by the Government's brief, is this and this alone: Finding

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ible or not, however, it is by no means unusual for such identification testimony to be mistaken. "Some of the most tragic miscarriages of justice have been due to testimonial errors in this field." Wigmore, *Science of Judicial Proof* (1937), p. 532; and see, also, Borchard, *Convicting the Innocent* (1931). In these circumstances and since the two grand juries, after hearing petitioner, were not sufficiently impressed to return an indictment against him, is it appropriate for the Secretary now to condemn him as a false witness?

that petitioner has in the past been chairman of an organization and associated with persons who (so confidential information indicates) were members of the Communist Party or engaged in Communist or espionage activities (the substance of paragraphs I-IV of the decision); the Secretary concludes that there is reason to believe that petitioner is now going abroad purposefully to engage in activities to advance the Communist movement. There is no finding of scienter or of petitioner's own involvement with the Party or with Communist or espionage activities.[5] In such circumstances, it is clear that the rational nexus which due process requires between the Secretary's findings and his conclusions is lacking. "The connection between the fact proved and that presumed is not sufficient. Reasoning does not lead from one to the other". *Manley* v. *Georgia*, 279 U.S. 1, 7; see, also, *Tot* v. *United States*, 319 U.S. 463.

2. *The Secretary's decision—a judgment of guilt by association.*

In light of the foregoing analysis, there can be little question, as we have argued in our main brief (pp. 61-62), that the Secretary's findings in this case assume relevance, if at all, only insofar as they reflect a judgment of petitioner's guilt by association. Conceding that such an official judgment of vicarious guilt is impermissible, the Government nevertheless cavalierly assures us that the Secretary "has not found petitioner 'guilty' of anything, in the proper meaning of that term [. . . that] in deciding passport applications, the Secretary does not sit as judge or jury to determine the truth or falsity of questions relating to past acts or past unlawful conduct" (Gov't. Br. 62-63).

This facile answer is but a frolic in semantics. As the Chief Justice remarked only the other day: "How simple

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[5] The Government's suggestion that there is a "finding of scienter" in this case (Gov't. Br. 52) is not borne out by the record (see R. 276-278).

would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!" *Trop* v. *Dulles*, No. 70, this Term, March 31, 1958, slip op. 8. The Secretary may not have used the term "guilty", but he has officially impugned petitioner's credibility and deprived him of precious liberties freely enjoyed by his fellow citizens. It avails petitioner nothing to be told that he has not been found nominally "guilty", but merely a person going abroad deliberately to engage in activities which will further the Communist movement. Moreover, how shall we reconcile the Government's glib disavowal of a verdict of guilt with its readiness to characterize petitioner as "a person who has been, and very likely will again become, if given the opportunity, deeply involved in Communist activity, possibly including espionage" (Gov't. Br. 64)?

Furthermore, there is not the slightest doubt that the Secretary's ruling—and now the Government's brief in its support—impose on petitioner that "badge of infamy" (*Wieman* v. *Updegraf*, 344 U.S. 183, 191; *Peters* v. *Hobby*, 349 U.S. 331, 347) which, as this Court has admonished, underlines "the need for procedural safeguards". *Cole* v. *Young*, 351 U.S. 536, 546.[6]

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[6] The Government's suggestion that the Secretary's determination "would not substantially add to petitioner's existing burdens" in this regard (Gov't. Br. 87, n. 45), since he has already been subjected to public obloquy, is an interesting exercise in fractionalization of Government responsibility. Apparently, since petitioner has already been harassed by the F.B.I. and other Federal Government officers (see R. 37, 39, 41), he may not be heard to complain of further harassment by the Secretary of State. The Government's suggestion recalls its argument in the court below (Br. for Appellee, No. 13717, C.A.D.C., p. 38) that the "badge of infamy" was of petitioner's own making, for, by remaining silent and not seeking judicial review, he might have worn the "badge" silently. Fortunately for the preservation of our liberties, there are always citizens among us who will speak out in vindication of their rights.

3. The vagueness of the grounds on which the Secretary's decision is based.

We have argued (Pet. Br. 46-51) that the passport denial here violates due process also because of the vagueness of the grounds on which it is based: (1) the Secretary's belief that petitioner "is going abroad to engage in activities which will advance the Communist movement for the purpose, wilfully and knowingly, of advancing that movement"; and (2) the Secretary's conclusion that "the issuance of a passport would be contrary to the national interest" (R. 278).

The Government's response to our argument is, first, that the words "Communist movement" cannot be deemed vague in light of the Congressional findings with respect to "the Communist movement" set forth in the Internal Security Act of 1950 (64 Stat. 987, 50 U.S.C. 781, *et seq.*), and the references to those findings by this Court in *Galvan* v. *Press*, 347 U.S. 522, 529, and *Carlson* v. *Landon*, 342 U.S. 524, 535. But this Court's approval of such Congressional findings as an adequate base for legislation cannot be equated with its acceptance of their validity as a standard for individual conduct, disregard of which results in loss of personal liberty. The issue in the one case is quite different from that in the other. In the former, the Court is concerned with the propriety of a congressional exercise of power; obviously no great precision is required in the findings by which Congress justifies the exercise of its power to legislate. Where, however, a congressional enactment or other governmental edict imposes a code of conduct which an individual is to heed at the peril of loss of liberty, due process requires that that edict be so precisely formulated as to afford fair notice to the individual of what he must do or may not do.

The congressional findings in terms of the "Communist movement" in the Internal Security Act are therefore of

no relevance to the issue which confronts us here. They were not designed to afford a guide to individual action. Indeed, the breadth of those findings is so vast that it is surprising to find the Government urging them as a standard for control of personal conduct. Significantly, the Act neither requires nor prohibits action by reference to the term "Communist movement."

Secondly, the Government argues that the meaning of the term "advance" with respect to the Communist movement is plain. But, for a demonstration of the vagueness of that term, one need but turn to the Government's brief (p. 50), where we are advised that "advance" means "to support, promote, aid, help, and render assistance to the Communist movement".[7]

The Government seeks to justify the "national interest" criterion relied on by the Secretary first, on the ground that it is but subsidiary and incidental to the "advancement of the Communist movement" standard. If so, however, it is subject to the same vice as the latter. Second, the Government refers to prior decisions of this Court which have sustained as valid, standards of "public interest" (see Gov't. Br. 51-52). But, the issue involved in the cited cases was the propriety of Congressional delegation to administrative bodies, not the validity of criteria controlling personal conduct. Considerations relevant in the one case are quite different, of course, from those in the other. The context of the terms of delegation within the entire framework of a statute and against the statute's purpose may be such as to make the standard meaningful

[7] The suggestion that the inherent vagueness of these terms is cured by the Secretary's conclusion that petitioner is going abroad "knowingly and wilfully" to advance the Communist movement is a specious one. According to the Government's argument, the voluntary and knowing purchase of a copy of "L'Humanité" at a Paris kiosk would constitute activity to advance the Communist movement.

to the administrators entrusted with execution of the legislative purpose. The very same terms, on the other hand, could well be meaningless to an individual whose conduct they were intended to control. In all of the cases cited in the Government's brief at pp. 51-52, it is notable that although the congressional delegation involved was couched in broad terms of "public interest", the specific orders directed to the individual citizens concerned were quite specific and precise.

In short, what the Government either fails or refuses to see is that we are here concerned with an administrative regulation which directly affects the mode of conduct of the individual citizen. Petitioner's fundamental right to travel has been abridged by his government because—so the Secretary says—there is reason to believe that he will engage in certain activities, which course of conduct bars him from exercise of that right. Petitioner would like to know just what he may do to have this bar lifted. The Secretary, however, persistently refuses to specify what are these activities in which he fears petitioner will engage. Were petitioner furnished with such a specification, he might conceivably be able to furnish assurance that he would not engage in the proscribed activities. Confronted, however, with the vague formulations, "advancement of the Communist movement" and "the national interest", petitioner can never know what he must do to satisfy the standard imposed for exercise of his right to travel abroad and thus he can never hope to vault the hurdle by which his Government restrains him. In consequence, his is a life imprisonment in his country for a cause of which he has never been informed.

4. *The Secretary's reliance on secret information.*

There is no dispute that the Secretary's determination in this case rests in vital part on undisclosed information. Indeed, as we have indicated (*supra*, p. 4-7), the Govern-

ment's brief ascribes even more significance to such secret information than did the Secretary himself.

a. The Government, however, insists, as we had anticipated it would (Pet. Br. 23), that petitioner was not "unduly prejudiced" by the use of such information (Gov't. Br. 65-68). Its argument comes to this—since petitioner was at all times aware of the past activities and associations with which he was charged; and "could best hope to refute" only the fact of such activities and associations; and, with but two exceptions, made no attempt to deny such activities and associations; and "was made aware of the general nature of the charges against the others with whom he was linked"; disclosure of the sources and details of information relating to the nature or character of his associates would have served no purpose and withholding them caused him no prejudice (Gov't. Br. 66-68).

This argument cannot withstand analysis. As we have pointed out (*supra*, p. 9-10), petitioner's past activities and associations, all of them innocent so far as the Secretary finds, assume relevance, if at all, only by reference to the allegedly culpable character of his associates. It is therefore the information bearing on these associates which lies at the very heart of this proceeding. All of this information is held secret. But, unless it is revealed, petitioner cannot hope ever to refute the charges against him. By the same token, absent disclosure, this Court can never intelligently review the Secretary's determination.

The summary afforded of "the general nature of the charges" (Gov't. Br. 68) furnishes no real aid. For, one cannot "be confident that a 'resumé is fair' when one cannot know what it is a resumé of . . . Language is treacherous and the meaning of what is written to no small degree derives from him who reads it". *United States* v. *Nugent*, 346 U.S. 1, 13 (Frankfurter, J., dissenting).

In our main brief, we have suggested advantages which petitioner might have derived from revealment of the information (Pet. Br. 23-24). Of course, we cannot know with certainty what use petitioner might have made of it. But clearly we are here concerned not merely with "an incidental infringement of technical rights". *Simmons* v. *United States*, 348 U.S. 397, 406. And, in that circumstance, as this Court has said, denial of the right to a fair hearing cannot be justified because the aggrieved person may have failed to "specify the precise manner in which he would have used this right—and how such use would have aided his cause." *Ibid.*

b. It would serve little purpose again to detail the conflicting interests of the citizen and the Government on this issue of disclosure. We are mindful that balancing these interests is not an easy matter; the decisions of this Court which have essayed the task attest to its difficulty. In advancing the Government's position, however, its brief seems to ignore the realities of the situation here and to misconstrue prior expressions of this Court.

The Secretary stated that disclosure of some of the information on which he relied "might prejudice the conduct of . . . foreign relations" (R. 278). But it cannot be gainsaid that by far the larger portion of the undisclosed information is not of that character. As the Government concedes, we "may assume that the bulk of the security information relied on by the Secretary . . . was . . . from F.B.I. reports" and the kind which has predominated in the Government's employee security and loyalty programs (Gov't. Br. 82). As to such information, the Government's interest in secrecy is primarily, if not solely, to avoid compromise of "investigative sources and methods" (R. 278.)

We have described the character of this kind of data in our main brief (pp. 36-37). And this Court has had occasion in recent years to appraise its worth. The evaluation

In Mr. Justice Frankfurter's dissent in *Jay* v. *Boyd*, 351 U.S. 345, 373, is unquestionably a fair one:

> ". . . We can take judicial notice of the fact that in conspicuous instances, not negligible in number, such 'confidential information' has turned out to be either baseless or false. There is no reason to believe that only these conspicuous instances illustrate the hazards inherent in taking action affecting the lives of fellow men on the basis of such information. The probabilities are to the contrary . . ."

We submit that the public interest is not served by keeping that kind of information secret at the expense of a citizen's liberties. "Indeed, it may well be that in the long run nothing but beneficial results will come from a lessening of . . . talebearing". *Parker* v. *Lester*, 227 F. 2d 708, 720 (C.A.9). A government intent on its duty to see that justice is done, that citizens' reputations are guarded against unfounded governmental accusation, and that their liberties are not unjustly impaired will, it seems to us, be serving the public interest better than one intent on maintaining a regiment of informers. Recent history supports this view. Cf., e.g., *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115; *Mesarosh* v. *United States*, 352 U.S. 1.

This Court's prior decisions which are cited in the Government's brief do not compel a contrary result. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, and *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U.S. 103, insofar as they sanctioned the President's reliance on confidential information, did so only with respect to information directly germane to relations between our Government and foreign governments and utilized in formulating political decisions, not judgments affecting personal liberties. *Totten* v. *United States*, 92 U.S. 105, and *United States* v. *Reynolds*, 345 U.S. 1, were suits for money judgments against the United States, the sovereign's consent to which was narrowly construed to

preclude revealment of "state secrets". Though the nominal defendant in this action, the Secretary is truly the "mover" here; it is he who has deprived petitioner of a right guaranteed by the Constitution, and not petitioner who asks largess from his Government. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, and *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, rest upon the duel doctrine that aliens have no rights and that the Executive has inherent power to control their movements. *Jay* v. *Boyd*, 351 U.S. 345, *Williams* v. *New York*, 337 U.S. 241, and *Escoe* v. *Zerbst*, 295 U.S. 490, were decided on the rationale that matters of grace, as opposed to right, were in question. The basic consideration which impelled the Court to permit withholding of the confidential reports in *United States* v. *Nugent*, 346 U.S. 1, was that the recommendation of the Department of Justice to which it was incidental was merely an advisory opinion, *Gonzales* v. *United States*, 348 U.S. 407, 412; the confidential reports were not even before the board which made the final determination in question. *United States* v. *Nugent*, *supra*, at 7, fn. 10.[8]

5. *The Government's reliance on other proceedings.*

In its summary of the facts, the Government makes reference, as it did in the court below, to evidence re-

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[8] *Liversidge* v. *Anderson* [1942] A.C. 206, and the other English decisions cited in the Government's brief (pp. 72, fn. 37, 79, 80) are inapplicable under a governmental system such as ours, one under a written constitution providing checks and balances, one of which checks against executive encroachment is an independent judiciary. See Douglas, J., dissenting in *Perez* v. *Brownell*, No. 44, this Term, Mar. 31, 1958. Moreover, as we have noted in our main brief (Pet. Br. 42, fn. 20), the *Liversidge* decision was handed down during the heat of war and when Great Britain was in mortal danger of invasion, circumstances quite different from those which confront our nation today. The English decisions have the virtue at least of making no pretense of conformance with a constitutional requirement of due process; they recognize an unfettered discretion in the executive.

ceived in other proceedings (Gov't. Br. 7-8, fn. 3,4; 11, fn. 5). By thus insinuating into this case records of proceedings to which petitioner was not a party and in which he was not even remotely involved, the Government seeks to lend color to findings of the Secretary otherwise quite meaningless so far as petitioner is concerned. Once again we are confronted with innovations introduced for the first time in the briefs of the Government; for the Secretary, so far as we know, himself never considered these other proceedings in reaching his determination. Whether or not he did so, however, the technique thus employed by the Government accentuates the disregard for due process in this case; it is the same pernicious practice which former Attorney General Brownell recently had occasion to impugn as characteristic of the system of "justice" in Soviet satellite states ("Satellite Justice on Trial", an address before National Conference on Citizenship, Sept. 19, 1953, p. 6):

> "Failure to assert the right to cross-examine has led to the most flagrant examples of proving guilt by association. In the trial of the Vatican Agents in Czechoslovakia in 1950, the judge announced that he was admitting in evidence the transcripts and files of ten other treason trials in order to complete the picture of the entire activity of the hierarchy and its ramifications. No defense lawyer jumped up to object to this method of establishing guilt".

We have a right to expect a higher standard of fairness from the officers of our own Government.

6. *The Government's view of due process.*

It is not surprising that the Government prefaces its argument with a lengthy exposition of what, in its view, is the nature of due process (Gov't. Br. 33-45). For only the Government's feeble image of that concept can justify the administrative procedures and decision in this case.

Let us understand what action this Court is asked to approve. It is asked to sanction the deprivation of a

citizen's fundamental constitutional right to travel on the basis of a government officer's conclusion that there was reason to believe that, in 1956, the citizen was going abroad to engage in activities purposefully to advance the Communist movement; a conclusion irrationally and *solely* inferred from the fact of his past associations, though in complete innocence, with one organization and certain persons who (we are told) confidential information indicates, had previously engaged in Communist or espionage activities. And this without permitting that information to be examined either by petitioner or by this Court. In short, this Court is asked to entrust the liberty and freedom of the citizen to the unbridled and unreviewable discretion of a government officer. Plainly such a result is irreconcilable with the principles of fair dealing which are the essence of constitutional due process.

The Government seeks to support such evisceration of the Due Process Clause, first, by reference to "the nature of the two powers [which, says the Government, were] here exercised in concert by the Congress and the Executive:—the defense and war power, and the foreign affairs power", contending that invocation of those powers permits limitations and procedures otherwise unacceptable (Gov't. Br. 35-36). But the restrictions of the Due Process Clause apply "with equal vigor" to the exercise of the war and foreign affairs powers as to any other power vested by the Constitution in the branches of our Government. See *Perez* v. *Brownell*, No. 44, this Term, Mar. 31, 1958, slip op. 13.[9] And, as the petitioners' brief

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[9] Moreover, as the court below itself recognized, "The issuance of a passport is not the conduct of foreign affairs" (R. 300). The Government has apparently accepted this view, for it now disclaims any inherent foreign affairs power in the Secretary to control foreign travel (Gov't. Br., No. 481, pp. 90-91, fn. 97).

The statement in the Government's brief (p. 74) that the issuance of a passport requires the affirmative conferral by the Secretary of his official sanction on the citizen traveller is not

in *Kent and Briehl* v. *Dulles*, No. 481, demonstrates, there is no concurrent exercise of power here by the Congress and the Executive; for the Congress has never authorized the Secretary to classify citizens on political grounds for purposes of travel control (see Pet. Br., No. 481, pp. 24-37).

The Government next argues that it was the purpose of Congress, when, in 1952, it enacted the statute codified as 8 U.S.C. 1185, to permit the Secretary to refuse to issue a passport and thus restrict travel on evidence available and satisfactory only to him and on his mere "reasonable suspicion"; and that, consequently, due process must be construed to accomodate that purpose (Gov't. Br. 36-45). By its terms, 8 U.S.C. 1185 contains no express grant of power to the Secretary to control travel; and for the reasons set forth in detail in petitioners' brief in No. 481, we do not believe it can be so construed. Even if it were so construed, however, the statute plainly grants no authority to the Secretary, whether expressly or by implication, to dispense with the traditional modes of proof and procedure embraced within the concept of due process. Nor does the Government find any such authority in the terms of the statute or even in its legislative history. What it seeks to do is to import such a radical grant of authority into the 1952 statute from the legislative history of a predecessor provision enacted in 1918 (Act of May 22, 1918, c.81, 40 Stat. 559).

So large and sweeping a grant of authority to the Executive as is claimed here is not ordinarily implied in the absence of an unequivocal Congressional declaration.

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true. There is no statutory requirement that a passport contain, as it now does, the Secretary's request to "all whom it may concern to permit safely and freely to pass, and in case of need to give all lawful aid and protection". A passport need merely attest to the citizenship of the bearer, and the Secretary is free to revise the form of the passport to eliminate any conferral of official sanction.

Interstate Commerce Commission v. *Cincinnati etc. R. Co.*, 167 U.S. 479; *Hannegan* v. *Esquire*, 327 U.S. 143. On the contrary, as this Court said, in *Ex parte Endo*, 323 U.S. 283, 300:

> "We must assume when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

Moreover, there are other considerations which militate against the Government's contention that from the 1918 legislative history we must conclude that the Secretary is today empowered to control travel in his unlimited discretion and without regard to traditional due process.

First, the 1918 statute was enacted in the light of a precise existing situation, directed to a precise evil, and limited in duration to that precise evil. It was enacted during World War I for the precise purpose of preventing espionage and sabotage on behalf of the German government (see Gov't. Br., No. 481, pp. 45-48). By its terms, it expired on the termination of that war. Even if it could be construed to sanction dispensation with due process safeguards, such authority, since it contained a restriction on constitutional rights, would be restricted to the precise purpose for which it was enacted, that is, the protection of the war effort in World War I. Cf. *Ex parte Endo*, *supra*.[10]

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[10] As we have indicated (*supra*, pp. 6, 8), the Secretary has not found that it was necessary to prevent petitioner's travel to India in order to protect the nation against espionage or sabotage. Had that been the reason for the passport denial, it would have been posited not on section 51.135(c) of the Passport Regulations, as was the case here, but rather on section 51.136 of the Regulations, which provide for refusal of a passport "where it appears to the satisfaction of the Secretary . . . that the person's activities abroad would . . . violate the laws of the United States . . ." (see Pet. Br., Appendix, pp. 77-78).

Second, we are aware of no doctrine which permits a repeal of the Due Process Clause and the protections it affords by the mere expedient of the expression of purpose in the course of Congressional debate. If that was the purpose of the Congress in enacting the 1918 statute, the statute *pro tanto* was invalid.[11] Nothing would be served therefore by transporting such infirmity into the 1952 enactment.

Nor is there any warrant for imputing to the Congress which enacted the 1952 statute, an intention to approve such a construction of its 1918 predecessor (see Gov't. Br. 41). The 1918 provision and its immediate successor, the Act of June 21, 1941, 55 Stat. 252, show a history of enforcement only of the provisions relating to travel by aliens; there is no history of enforcement of their provisions relative to restraint on citizens (see Gov't. Br., No. 481, pp. 54-55, fn. 55). There is good reason for this lack of history. Citizens rarely exercised their right to travel abroad during World Wars I and II, and restraints on citizens' travel on political grounds were generally not imposed by the Secretary prior to 1950 (see Gov't. Br. No. 481, p. 64); consequently, there were no occasions for judicial consideration of the provisions in the 1918 and 1941 statutes affecting citizens. In view of the fact that such provisions were generally not invoked prior to 1950 and there had been little, if any, exercise of that power,

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[11] The officers in the State Department who were responsible for administering the 1918 enactment apparently did not construe the statute as radically as the Government does now. In the Passport Control instructions of December 16, 1920, printed in the Appendix to the Government's Brief in No. 481, pp. 125-126, appears the following caveat (at p. 126)

> "In every case [of passport refusal on political grounds], action upon reports, showing that a person comes within one of the classes noted, *should be based upon specific facts*. Each case should be adjusted upon *tangible and incontrovertible evidence* of revolutionary activity, *rather than on* suspicion." (Emphasis supplied).

there is no basis for inferring that Congress, when enacting the 1952 statute, was indicating approval of any prior executive conduct.

The Government, however, insists that to deny the Secretary authority to dispense with traditional due process safeguards "would nullify, as a practical matter, the concept of travel control as a distinct and legitimate power of Government designed to accomplish a limited goal" (Gov't. Br. 45). This is but a fanciful dilemma. If the Secretary is authorized to control travel abroad of citizens on political grounds—which we would deny—there is no reason we can conceive why such control cannot and should not be exercised in strict conformance with every requirement of due process. To do so may undoubtedly increase the difficulty of the Secretary's task, but, as contrasted with totalitarian governments, we have always been proud to forego expeditious short-cuts where they would impair the personal liberties of our citizenry. In any event, before resorting to such short-cuts, we have insisted at the least on a clear expression by the Congress that they are necessary and a legislative enactment unequivocally authorizing such departures from our traditional system of justice. These are absent here.

We are quite cognizant of Mr. Justice Holmes' reminder that "what is due process of law depends on circumstances . . . [and that it] varies with the subject-matter and the necessities of the situation". *Moyer* v. *Peabody*, 212 U. S. 78, 84. But, as the Chief Justice recently admonished: "The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our nation. They are the rules of government". *Trop* v. *Dulles*, *supra*, slip op. 17. "The requirement of 'due process' is not a fair-weather or timid assurance . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 162 (Frankfurter, J., concurring). It may not be

tortured on a Procrustean bed to fit the convenience of each moment or to ease the task of government officers in the performance of their functions. Mr. Justice Frankfurter's remarks in the *Joint Anti-Fascist Committee* case, *supra,* 341 U.S. at 173-174, are peculiarly apt here:

> "We are not here dealing with the grant of Government largess. We have not before us the measured action of Congress, with the pause that is properly engendered when the validity of legislation is assailed. The Attorney General [or the Secretary in our case] is certainly not immune from the historic requirements of fairness merely because he acts, however conscientiously, in the name of security. . . . Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances".

Let us not indulge in pretense. What the Government is asking is that this Court sanction the destruction of a citizen's liberty at the hands of a governmental officer acting *in camera* and in his complete and unfettered discretion. We again recall the caveat of Mr. Justice Matthews in *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370, perhaps more timely today than when it was first uttered: "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself".

Respectfully submitted

HARRY I. RAND
Attorney for Petitioner

April, 1958

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No. 621

In the Supreme Court of the United States

OCTOBER TERM, 1957

WELDON BRUCE DAYTON, PETITIONER

v.

JOHN FOSTER DULLES, INDIVIDUALLY AND AS SECRETARY OF STATE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1957

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WELDON BRUCE DAYTON, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Petitioner seeks review of a decision of the Court of Appeals for the District of Columbia Circuit upholding the denial by the Secretary of State of petitioner's application for a passport. The court below, stating that "the case falls into two parts", addressed itself first to the question of whether the Secretary of State could validly refuse to issue petitioner a passport on the basis of a determination that petitioner was going abroad knowingly and wilfully to advance the Communist movement, and held that "[t]hat question was answered fully in *Briehl*. We there held he could refuse upon that ground." (Pet.

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App. C, p. 5.) The court also ruled in favor of the Secretary in answering the second question—"whether the Secretary could base his conclusion in this matter partly upon confidential information" (*id.* at 5–11).

We agree that the initial questions presented in this case, to the extent that they concern the basic authority of the Secretary of State to restrict the travel of citizens by refusing to issue passports on the grounds set forth in Section 51.135 of the Passport Regulations (22 C. F. R., 1956 Supp., 51.135), are essentially the same as some of the issues presented in *Kent and Briehl* v. *Dulles*, No. 481, this Term. We did not oppose the petition for certiorari in that case, and on November 25, 1957, this Court granted certiorari. In these circumstances, the respondent does not oppose the granting of the writ of certiorari in the present case.

It may be that, with regard to this initial aspect of the present case, the Court will be inclined to withhold action upon the petition until it disposes of *Kent and Briehl*. It is therefore appropriate to summarize briefly our views on the second aspect of the case—which presents a question not raised in *Kent and Briehl*. As the court below pointed out in connection with this second issue, "[t]he Supreme Court has not passed upon the precise question here before us, *i. e.*, the permissible reliance upon confidential information in a passport case" (Pet. App. C, pp. 5–6). In our view, the issue is also an important one and is appropriate for authoritative disposition by the Court in this case. We therefore do not oppose the grant-

ing of the writ of certiorari to consider this aspect of the case, as well as the aspect related to *Kent and Briehl*. At the same time, we express our belief that the ruling below, based upon "helpful guideposts in the principles laid down by the [Supreme] Court in different fields" (*id.* at 6), is correct. Moreover, we do not agree that the decision is in conflict with that of the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester*, 227 F. 2d 708, as petitioner asserts (Pet. 11, 14–15). While that case likewise concerned the validity of the use of confidential information in an administrative proceeding—as judged by the standards of due process—the subject matter, the governing statute, the regulations under which the administrative proceedings were conducted, and the manner in which the regulations were applied, all varied greatly from the present case. Since such variations in particular circumstances are of the very essence in determining whether the requirements of due process have been met, it cannot be said that the ruling of the court below on the propriety of the use of confidential information in this particular passport case is in conflict with that of the Ninth Circuit in the different cases arising under the Port Security Program of the Coast Guard.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

DECEMBER 1957.

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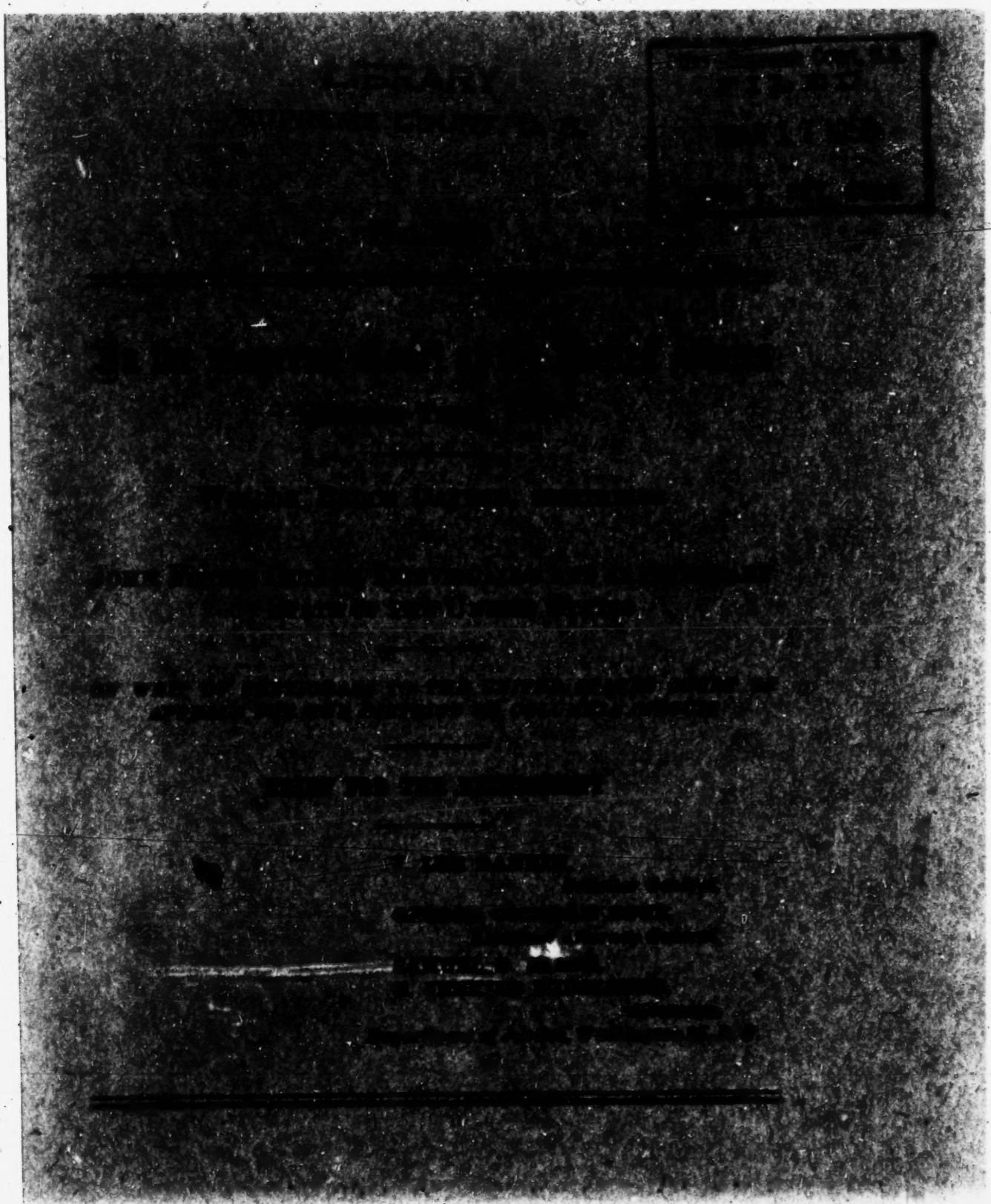

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 621

WELDON BRUCE DAYTON, PETITIONER

v.

JOHN FOSTER DULLES, INDIVIDUALLY AND AS SECRETARY OF STATE OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The unreported memorandum opinion of the District Court preceding the first appeal is printed at R. 56. The opinion of the Court of Appeals on the first appeal is not reproduced in the record but is reported at 237 F. 2d 43. The opinion of the District Court on remand (R. 280–289) is reported at 146 F. Supp. 876. The opinions of the Court of Appeals on the second appeal (R. 291–302) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals (R. 303) was entered on October 24, 1957. The petition for a writ

of certiorari was filed on November 21, 1957, and an order granting the petition and ordering the case consolidated with No. 481 was entered on January 6, 1958 (R. 304). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

In addition to the basic issues presented in *Kent, et al.* v. *Dulles,* No. 481, this case presents the following questions:

1. Whether the Secretary of State may validly deny a passport, after a hearing, to a person who the Secretary has reason to believe, on the balance of all the evidence, is going abroad to engage in activities which will advance the Communist movement for the purpose of knowingly and wilfully advancing that movement.

2. Whether the Secretary of State violated the requirements of substantive due process in concluding that petitioner was such a person.

3. Whether, in the circumstances of this case, the Secretary of State violated the requirements of procedural due process by relying in part upon confidential information to support the denial of petitioner's passport application.

4. Whether the denial of petitioner's passport application effected an unconstitutional infringement of his First Amendment rights.

STATUTES, PROCLAMATIONS, EXECUTIVE ORDERS AND REGULATIONS INVOLVED

The pertinent portions of Titles 8, 22 and 50 of the United States Code; of Presidential Proclama-

tions No. 2914 of December 16, 1950 and No. 3004 of January 17, 1953; of Executive Order No. 7856 of March 31, 1938; and of certain of the regulations of the Secretary of State relating to passports are printed in the Appendix to the Brief for the Respondent in *Kent, et al.* v. *Dulles,* No. 481, at pp. 102–116. The Passport Regulations issued in Departmental Order No. 108.162, effective August 28, 1952 (17 F. R. 8013) and the Rules of the Board of Passport Appeals are printed in the Appendix to this brief, *infra,* at pp. 108–117.

STATEMENT

In this action, petitioner seeks a judgment declaring that he is entitled to a passport and that the regulations issued by the Secretary of State governing the issuance of passports are unlawful; enjoining the Secretary from continuing to deny him a passport; and directing the Secretary to issue him a passport (R. 4). The facts are as follows:

1. *Application and initial proceedings in the Passport Office.*—Petitioner Dayton, a research physicist, filed an application for a passport on March 5, 1954, stating that he intended to visit Great Britain, Holland, France, Switzerland, Italy, and India and setting forth as the purpose of his trip the acceptance of a three-year appointment as a research physicist at the Tata Institute of Fundamental Research in Bombay (R. 6, 52). On April 14, 1954, the Director of the Passport Office informed him that the Department of State felt that it would be contrary to the best interests of the United States to issue him a pass-

port at that time (R. 10). After a meeting attended by petitioner, his attorney, and an officer of the Passport Office (R. 53), Dayton submitted an affidavit to the Passport Office confirming oral statements which he had made at the conference with respect to his past associations and organizational affiliations (R. 10–42, 53). He stated therein, *inter alia*, that he was not then and never had been a member of the Communist Party; that, with the possible exception of a casual and brief association with the Joint Anti-Fascist Refugee Committee, he was not then and had never been a member of any organization designated on the Attorney General's list; that he was not then and had never been engaged in any activities which, so far as he knew, supported the Communist movement; and that he was not going abroad to engage in any activities which, so far as he knew, would in any way advance the Communist movement (R. 12; see also R. 158–161).

The Director of the Passport Office thereafter informed Dayton that the Department adhered to its previous decision (R. 42–43), stating that "the Department took into consideration [Dayton's] connection with the Science for Victory Committee and his association at that time with various communists", but that "the determining factor in the case was Mr. Dayton's association with persons suspected of being part of the Rosenberg espionage ring and his alleged presence at an apartment in New York which was allegedly used for microfilming material obtained for the use of a foreign government" (R. 44).

Dayton filed a petition of appeal with the Board of

Passport Appeals, requesting, in accordance with Section 51.162 of the Rules of the Board (22 CFR, 1956 Supp., 51.162; App., *infra*, p. 115), additional information as to the reasons for the denial of his application (R. 44–48). The counsel for the Board of Passport Appeals informed Dayton's attorney that, while the information which the Board might disclose was limited by security and other considerations (R. 48), he was authorized to state that the file contained information indicating that Dayton was present at 65 Morton Street, New York City, in July or August of 1949, and in Apartment 6–I of the same address during the month of January, 1950. The letter also stated that Dayton's relationship with the following-named persons was considered pertinent: Marcel Scherer, Rose Segure, Sandra Collins, Frank Collins, Bernard Peters, Kurt Fritz Karl Sitte,[1] Louis S. Weiss, Alfred Sarant, and William Perl (R. 49).

2. *Hearings before the Board of Passport Appeals.*—

(*a*). *First hearing before the Board.*—

On January 18, 1955, Dayton, accompanied by his attorney, appeared at a hearing before the Board of Passport Appeals (R. 58–170). He testified as follows concerning the associations and activities which he had been informed were considered pertinent to the Board's review:[2]

---

[1] Through a printing error, the Record at p. 49 lists "Kurt Fritz" and "Karl Sitte" as two people. Kurt Fritz Karl Sitte is a single individual; see R. 155.

[2] In some instances, this testimony overlaps that contained in Dayton's affidavit (R. 10–42); in a few instances, the testimony is found solely in the affidavit. References will therefore be made to both the transcript (R. 58–170) and the affidavit.

(*i*). *Dayton's association with the Science for Victory Committee.*—Dayton testified that the Science for Victory Committee, which he described as a loose organization with a lifetime of less than a year during 1943 and 1944, was established to support the so-called Science Mobilization Bill and to help make more efficient use of scientific manpower in the San Francisco Bay area (R. 17, 19, 22, 73, 82). The Committee was chiefly organized by Rose Segure and Frank and Sandra Collins (R. 18, 74), and Dayton served as chairman of the Committee throughout its existence (R. 19). In response to a question of a member of the Board of Passport Appeals inquiring whether there was, to Dayton's knowledge, "any Communist influence in organizing or running the affairs of the Science for Victory Committee", Dayton replied that he did not so regard it; that he had "been told in the course of investigations of me by the FBI agents and in the more recent years I have been told on various occasions that Frank and Sandra Collins and Rose Segure were well known Communists", but that they were not so known to him (R. 79). "I mean, they were left wing. I don't recall any time that any one of them ever made it clear to me that they were a Communist" (R. 79; see also R. 80–83). Dayton further testified that he had "been asked by agents of the FBI more or less as follows: 'didn't you realize that the Science for Victory Committee was dominated by Communists?'", and that his answer had been "No"; that he himself largely dominated it and set its policies; and that he "was not Communist" (R. 83; see also R. 92, 93).

(ii). *Dayton's association with Alfred Sarant and presence at 65 Morton Street, New York City.*— Dayton testified that he and his wife Carol met Alfred Sarant and his wife in Ithaca, New York, in the fall of 1946 (R. 28, 29, 97). The Daytons and Sarants became good friends and began building adjacent homes in the summer of 1947 (R. 29, 97). In June 1948 the Sarants moved in with the Daytons pending the completion of the Sarant home, and the two families continued to live under the same roof for the next eight months (R. 29, 98). Thereafter, the Daytons and the Sarants were next-door neighbors for approximately a year and a third (R. 98).

On or about July 18, 1950, Alfred Sarant came under intensive interrogation by agents of the FBI (R. 30, 98). Sarant told Dayton that he was being investigated in connection with an apartment which he had maintained in New York City which was believed to have been used for espionage activities (R. 30, 96–97, 99). Dayton testified that he immediately became aware that his wife was "deeply emotionally involved" with Sarant (R. 30, 100). She left Ithaca on July 24, ostensibly to break with Sarant and to look for an apartment in Boston (R. 30, 31, 101), but instead met Sarant in New York City and entered Mexico with him on August 13, 1950[3] (R. 31, 34, 101, 102). Dayton testi-

[3] It is to be noted, for such relevance as it may have, that Morton Sobell, convicted of the same offense as the Rosenbergs, fled to Mexico but was deported back to the United States and arrested on August 18, 1950. *United States* v. *Rosenberg, et al.*, 195 F. 2d 583, 589, 602 (C. A. 2); and 200 F. 2d 666 at 668.

fied that neither his wife nor Sarant have been heard from since (R. 34, 102).

Meanwhile, on August 2, 1950, FBI agents contacted Dayton and inquired into his background, including his connection with the Science for Victory Committee, Rose Segure, Frank and Sandra Collins, and Sarant (R. 31, 102). They further asked when Dayton had last been in New York City, whether he had been at 65 Morton Street in Greenwich Village, and whether he had moved furniture at that address with William Perl in January 1950[4] (R. 31, 32, 102, 103). Dayton told the agents that he had heard of

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See also *United States* v. *Perl*, 210 F. 2d 457, 461 (C. A. 2). David Greenglass, an admitted member of the Rosenberg ring, was arrested on June 15, 1950 (*United States* v. *Rosenberg, et al.*, 108 F. Supp. 798, 804 (S. D. N. Y.)), after having been advised to flee to Mexico by Julius Rosenberg, who gave him $5,000 for the trip. *United States* v. *Rosenberg, et al.*, 195 F. 2d 583, 589 (C. A. 2).

[4] The apartment at 65 Morton Street figured in Perl's trial for perjury in having falsely testified, before a Federal grand jury in the Southern District of New York in August 1950, that he did not know Julius Rosenberg or Morton Sobell. *United States* v. *Perl*, 210 F. 2d 457 (C. A. 2). In upholding Perl's conviction, the Court of Appeals took note of the following evidence adduced at the trial: In 1944 Perl, Rosenberg and others went to a "walk-up apartment on Morton Street in Greenwich Village where, after climbing five flights of stairs, they woke up Al Sarant * * *," talked for half an hour, and then "left Sarant's apartment" (*id.* at 460). In 1946, two of the witnesses met Rosenberg "outside of the apartment house where Sarant lived on Morton Street" and later met Perl and Sobell (*ibid.*). Perl subleased Apartment 6-I at 65 Morton Street from Sarant, lived there for a substantial period of time, and gave it as his voting residence in 1947 and 1948; he failed, however, to list that address in a statement of previous addresses in a "Personal [sic] Security Questionnaire" filled out for the Atomic Energy Commission (*id.* at 461).

the Morton Street apartment and of Perl through the Sarants, but denied having been at that address, having ever moved furniture in New York, or having any recollection of meeting Perl (R. 32, 103); after checking dates, he stated that he had been in New York from February 1 to February 5, but not during January (R. 31, 32, 102, 104).

In order to check the possibility of mistaken identity, Dayton was flown to Newark, New Jersey, on August 8, 1950, and introduced to Floyd Elwyn, Sr., and Mr. and Mrs. Floyd C. Elwyn, all of whom identified Dayton as a person they had seen in the apartment building at 65 Morton Street (R. 32–33, 104–106; see, *infra*, pp. 13–17). Floyd C. Elwyn added that he had seen Dayton there in July 1949 and January 1950, and that, on one of these occasions, Dayton was in the Sarant apartment eating breakfast in his pajamas (R. 32, 33, 104–106). Dayton denied ever having seen the Elwyns before, having been in New York City the previous summer, or having worn pajamas since the age of eleven, and in a statement subsequently submitted to the FBI, reiterated these denials and disavowed any espionage activities at any time (R. 32–34, 105–107). The substance of the foregoing denials, including those previously made to the FBI agents in Ithaca, were repeated at the Board hearing (R. 133, 134, 268, 269; see also R. 37, 40).

Dayton thereafter submitted a statement to the FBI concerning his whereabouts during the month of January 1950, in which he sought to document each day through references to his own research notes and

to log books maintained at the Cornell University cyclotron (R. 167–170; see also R. 29, 30, 33, 34, 108–117). In April and June, 1951, Dayton appeared under subpoena before federal grand juries in the Southern District of New York investigating the "second echelon" of the Rosenberg spy ring. The questioning there was similar to that of the FBI agents (R. 35, 36, 111, 116, 117, 134).

Dayton also testified at the Board hearing to his associations with Louis S. Weiss and his wife (R. 40, 132, 142–144); Marcel Scherer (R. 83, 84); Kurt Fritz Karl Sitte (R. 155–160); Maxwell Finestone, whom he knew through the Sarants in Ithaca and who told Dayton that he had lived at the 65 Morton Street apartment (R. 136–139); and Gary Pickard, to whom he had been introduced during the grand jury proceedings in New York (R. 139). Pickard at that time stated that he had lived at 65 Morton Street, remarking to Dayton that he seemed to remember meeting him "at 65 Morton Street and I think Max Finestone introduced us," a statement which Dayton denied (R. 140). Pickard did, however, look familiar to Dayton but he could not place him (*ibid.*).

Dayton told the Board that, since the FBI had told him a great deal about Sarant, he could not recall for sure whether he had any reason to believe that Sarant was a member of the Communist Party during the period he knew him, and that he was not aware at that time, if it was a fact, that Sarant was attending Communist Party meetings or was a member of a Communist organization (R. 153–155). He had no reason to believe Sarant was engaged in any subversive or

disloyal activities (R. 153–155). Dayton was sure that his wife, Carol, was never a member of or active in the Communist Party, her political views being essentially his own, which he characterized as "left of center, but I have never been intrigued enough by the Communists to ever entertain the idea of becoming a Communist Party member, and I have become increasingly so as time went on" (R. 41, 153, 161, 162). Dayton testified that his association with the Joint Anti-Fascist Refugee Committee lasted for only a few months in 1941 and 1942 (R. 12, 23, 24, 158, 159).

(*iii*). *Dayton's association with Bernard Peters.*— Dayton testified that he has maintained an intimate association with Bernard Peters since a short time after they met in 1938 and has no better friend than Peters (R. 15–17, 148–149). It was Peters who, in 1943, first told Dayton of the Science for Victory Committee (R. 1[illegible] 22, 85, 87). Peters at that time was working on a highly classified project, connected with the Manhattan Project, at the Radiation Laboratory in Berkeley, California (R. 16, 86). Dayton inquired through Peters concerning the possibility of a job at the Radiation Laboratory in the fall of 1945 and was interviewed but rejected on security grounds (R. 85, 86, 93, 94). Dayton suspected that the rejection was based in part upon his connection with the Science for Victory Committee (R. 88).

Petitioner testified that he was very sure that Peters was not a Communist[5] (R. 16, 80, 150, 151). Al-

[5] With regard to Dr. J. Robert Oppenheimer's testimony before an executive session of the House Committee on Un-

though he had no basis for saying that Peters' wife, Dr. Hannah Peters, could not have been a Communist, he had no reason for believing that she was, and was inclined to believe that the characterization of her, in the charges filed by the Atomic Energy Commission against Dr. J. Robert Oppenheimer, as an "organizer of the professional section of the Communist Party, Alameda County, California,"[6] was in error (R. 150, 151).

Peters, who is a leading cosmic-ray physicist, has been working at the Tata Institute in Bombay since 1951 and was instrumental in securing the offer of a position there for Dayton (R. 16, 17, 150). The opportunity to work with Peters was stated to be one of the chief reasons for petitioner's desire to go to India (R. 72).

(*iv*). *Dayton's purpose in traveling abroad.*— Petitioner testified that his purpose in desiring to go to India was to accept the position at the Tata Institute, where he would be working in pure physics and continuing his work as a cosmic-ray physicist, a field of research which he characterized as devoid of secrecy (R. 71, 72, 146). Dr. Dale R. Corson, a Professor of Physics and an associate of Dayton at Cor-

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American Activities, in which Dr. Oppenheimer characterized Peters as "a dangerous man and quite Red," and testified that Peters had told him that he had been a member of the Communist Party in Germany, see U. S. Atomic Energy Commission, *In the Matter of J. Robert Oppenheimer*, Transcript of Hearing before Personnel Security Board, 1954, pp. 210–211. For Dr. Oppenheimer's subsequent explanation and partial retraction of this testimony, see *id.* at 211–215.

[6] *Id.* at 5.

nell University, testified before the Board at petitioner's request (R. 118–132, 127). In addition to giving testimony tending to corroborate Dayton's accounting of his whereabouts during the month of January 1950 (R. 119–124, 127, 128), Dr. Corson testified that, despite the fact that, in all fields related to nuclear physics or indeed any kind of physics, there have been developments which have been classified and which have gone into classified laboratories such as Los Alamos, and despite the fact that the field of cosmic-ray research is an allied field to that of atomic energy research, cosmic-ray research itself and its results are unclassified (R. 126). So far as he knew, the work at Tata Institute was largely in cosmic rays and that none of the work there was classified (R. 129).

(*b*). *Second hearing before the Board.*—

The hearing of January 18, 1955 was adjourned subject to reopening (R. 166), and, on March 29, 1955 the hearing was reconvened in New York City for the purpose of offering petitioner an opportunity to confront three witnesses (R. 171), Floyd Elwyn, Sr., and Mr. and Mrs. Floyd C. Elwyn, all of whom appeared voluntarily and testified under oath substantially as follows to their recollection of Dayton's presence some five years earlier at 65 Morton Street:

Floyd C. Elwyn: Floyd C. Elwyn, superintendent of the apartment building at 65 Morton Street, was on the witness stand for close to three hours, most of that time under cross-examination by Dayton's attorney (R. 221). He testified that he had seen Dayton at 65 Morton Street on four occasions and that, on

one of these occasions, Dayton was in Apartment 6–I (R. 174–245).

Admitting at the outset that he was "possibly * * * a little bit mixed up on dates right now" since it had "been quite a long time since things have passed" (R. 175), Elwyn testified that the first time he had seen petitioner was approximately a year after he had started working at 65 Morton Street.[1] Elwyn stated that he recalled having seen Dayton, without knowing who he was, on two occasions in approximately September or October 1949 when they walked past each other in the lower hall of the apartment

[1] Elwyn initially set the date when he began working at 65 Morton Street in the following colloquy (R. 174):

"* * * I have resided there now since, let me see, just about six years I believe I have resided there continuously.

"QUESTIONS BY THE CHAIRMAN:

"Q. Since about 1949?—A. That's right, sir.

"Q. Do you recall roughly the month?—A. I came there in October.

"Q. Of '49?—A. Of '49, yes."

Accordingly, Elwyn initially testified that he had first seen petitioner in September or October of 1950—an obvious impossibility, as petitioner and his attorney knew, since it was in August 1950 that Elwyn identified Dayton at the Newark Airport as the man he had seen at 65 Morton Street in the summer of 1949 and January 1950 (R. 32, 33, 104–106, 175, 193, 207). Elwyn continued throughout his testimony to date the incidents by reference to the time he began working at 65 Morton Street, and to express his uncertainty as to the exact months in question due to the lapse of time (R. 193, 194, 217). After referring to his income tax forms during a recess, Elwyn testified that he had begun working at 65 Morton Street in October 1948 (R. 225, 227). He therefore placed the incidents relative to petitioner in approximately September or October and December of 1949, to the best of his recollection (R. 225, 226; see also R. 219).

building (R. 214–217, 236, 237, 244). In addition, according to Elwyn, mail had come for Dayton and the mailman had asked for Dayton's apartment number (R. 175).

The first time Elwyn really noticed Dayton, he testified, was in Apartment 6–I, after Sarant had notified the office that the apartment was to be vacated by the first of the month (R. 174–176, 195, 197, 199). Elwyn testified that he entered the apartment and found the person he now knows as Dayton sitting at a card table in pajamas eating crackers and milk, and that there ensued a conversation relative to Sarant and to obtaining Finestone's cooperation in seeing to the removal of the furniture[8] (R. 175–177, 199, 202–203).

The witness testified that he next saw Dayton three or four days later, on a Saturday or Sunday morning toward the last of the month, when Dayton, Finestone, Perl, and a fourth man, all of whom appeared very friendly with each other, moved the furniture from Apartment 6–I to the basement (R. 177, 178, 206, 207). During the moving, Elwyn came to the door of his basement apartment and looked out through the screen door; Dayton and Finestone were carrying furniture and stopped directly in front of Elwyn's door, facing him, and placed the furniture across the hall (R. 212, 213). Petitioner was wearing khaki

[8] This is the only direct evidence in the open record indicating that Dayton was present in Apartment 6–I itself. The Secretary made no finding based directly upon this testimony, finding that, on the basis of the open record, Dayton "was present * * *, on more than one occasion, in the apartment building at 65 Morton Street * * *" (R. 277).

pants and, Elwyn believed, a suntan shirt (R. 213).

Elwyn further testified to the identification at Newark Airport which had taken place some six or seven months later (*supra,* p. 9) and to a subsequent identification of Dayton at FBI Headquarters in Foley Square, New York, during a hearing (R. 179–181). The witness stated that "[t]here is no doubt whatsoever in my mind, which I have stated before and I still state, there is no doubt in my mind" that Dayton, who had been in the hearing room throughout Elwyn's testimony before the Board, was the same man whom he had seen in and around Apartment 6–I, 65 Morton Street (R. 243, 244).

Mrs. Floyd C. Elwyn: Mrs. Floyd C. Elwyn was called next and testified that she saw Dayton, with Finestone and Perl, moving furniture from Apartment 6–I to the basement outside the Elwyns' apartment door (R. 246, 247). Although she could not recall the exact date, she had some idea that it was around January 29, 1950, possibly a Sunday (R. 247, 251, 252). She stated that she went out into the basement and took "a good look at the gentlemen" because she was curious to see who the people were who had lived in what the other tenants referred to as the "ghost" apartment (D. R. 248). When the Chairman of the Board indicated Dayton and asked the witness whether he was one of the three men, she replied: "Yes, he was one of the three men. That I do definitely remember" (*ibid.*). Dayton was wearing suntans at the time (R. 247). Mrs. Elwyn testified that she had observed the three men for approximately five minutes and "took a close look at [Dayton's]

features" (R. 253), and it was by his features, which she described as average, that she was able to identify his photograph when the FBI, less than eight months later, showed her several pictures and asked her if she recognized Dayton [9] (R. 250, 253, 254).

Mrs. Elwyn also thought she might have seen Dayton in the lower hall several months prior to the furniture moving incident (R. 249).

Floyd Elwyn, Sr.: Floyd Elwyn, Sr., testified that he had seen Dayton in the 65 Morton Street entrance, on the landing, on Morton Street, and in the Emerald Grocery Store on Hudson Street (R. 255, 256, 262), placing the dates originally as somewhere between 1943 or 1944 and 1950 but later stating that as near he could recall it was in the latter 1940's (R. 260). Elwyn Sr. first learned Dayton's name, he testified, when he heard a man say to Dayton, who was standing on the stairs near the mailboxes, words to the effect that "There is no mail for you, Mr. Dayton" (R. 261, 262). The witness testified that he remembered Finestone, Perl (who received mail at Apartment 6–I), and Sarant, but that he had never seen Dayton in their company (R. 258, 259).

At the close of the hearing, Dayton reiterated his prior denials, adding that he had never worn khaki shirts and pants together prior to 1952 (R. 268–270).

3. *Initial denial by the Secretary.*—On September 7, 1955, the Secretary of State informed petitioner that, after receiving the recommendation of the Board of

[9] The record would appear to indicate that Floyd C. Elwyn also made a photo identification of Dayton (R. 240, 241, 244).

Passport Appeals and after "a review of the entire record", he had disapproved his request for passport facilities "under Section 51.135 of the passport regulations" [10] (R. 4, 5).

4. *Initial proceedings in the courts below and subsequent proceedings in the Department of State.*—Dayton then filed his complaint in the District Court (R. 1–5), which entered summary judgment for the Secretary and dismissed the complaint (R. 56, 57). On ap-

[10] Section 51.135 (22 CFR, 1956 Supp., 51.135) provides as follows:

> *Limitations on issuance of passports to persons supporting Communist movement.* In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:
>
> (a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party;
>
> (b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement.
>
> (c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement.

peal, the judgment of the District Court was reversed and the case remanded with directions for further proceedings by the Secretary on the ground that the letter of denial should have specified the subsection of the regulation upon which the denial was based and should have set forth findings sufficient to bring Dayton within the terms of the subsection. *Dayton* v. *Dulles*, 237 F. 2d 43, 44.

Following reconsideration, the Secretary of State rendered his Decision and Findings and again denied the application (R. 275–278). Due to the importance of the Decision and Findings to the case, they are set forth here verbatim (see R. 275–278):

> I have examined the files of the Department of State concerning the passport application of Weldon Bruce Dayton, including the proceedings in the Passport Office and before the Board of Passport Appeals, including confidential security information, and have found and concluded as follows:
>
> I.
>
> *a.* I find that applicant was active in the Science for Victory Committee while at the University of California during 1943–44, serving as Chairman of the organization during much of that period. As Chairman he associated with Frank and Sandra Collins, and Rose Segure, who had been instrumental in organizing the said organization. This finding is based on information contained in the open record, including applicant's own statements.
>
> *b.* Confidential information contained in the files of the Department of State, constituting

a part of the record considered by the Passport Office, the Board of Passport Appeals, and myself, indicates that the above-named organization was conceived and organized by Communist Party officials as a front for propaganda and espionage activities; and that Frank and Sandra Collins and Rose Segure were members of the Communist Party at the time of their association with applicant and the Science for Victory Committee.

II.

a. I find that during the period 1946–1950, at Ithaca, New York, applicant maintained a close association and relationship with one Alfred Sarant. At applicant's invitation, Sarant and his wife lived in applicant's home for a period of eight months in 1947–1948, pending the completion of the Sarant home next door to applicant's home. Thereafter Dayton and Sarant were neighbors until July, 1950. On approximately July 18, 1950, Sarant became the subject of intensive interrogation by the Federal Bureau of Investigation. Approximately a week after the interrogation had begun Sarant departed from Ithaca and subsequently entered Mexico with applicant's wife. This finding is based on information contained in the open record, including applicant's own statements.

b. Confidential information contained in the files of the Department of State, constituting a part of the record considered by the Passport Office, the Board of Passport Appeals, and myself, establishes with respect to Alfred Sarant that he was an active member of the Communist Party; that he admitted said member-

ship during the years 1943 and 1944; and that he was involved in the espionage apparatus of Julius Rosenberg.

III.

a. I find that the applicant was present during 1949 and 1950, on more than one occasion, in the apartment building at 65 Morton Street, New York City, in which Alfred Sarant was lessee of apartment 6–I. This finding is based on information contained in the open record.

b. Confidential information contained in the files of the Department of State, constituting a part of the record considered by the Passport Office, the Board of Passport Appeals, and myself, indicates that Sarant's apartment at 65 Morton Street, New York City, was used by Julius Rosenberg and other members of his spy ring for the microfilming of classified United States Government documents which were ultimately transferred to a foreign power.

IV.

a. I find that since 1938 the applicant, an experienced physicist, has maintained a close association and relationship with one Bernard Peters; that Peters was responsible for the applicant's offer of employment at the Tata Institute of Fundamental Research, Bombay, India; and that one of the primary stated purposes of the applicant's proposed travel abroad is to work in close collaboration with Peters at the Tata Institute. This finding is based on information contained in the open record, including applicant's own statements.

b. Confidential information contained in the files of the Department of State, constituting a part of the record considered by the Passport Office, the Board of Passport Appeals, and myself, indicates that Bernard Peters, who recently renounced his American citizenship, has held membership in the Communist Party outside of the United States; has engaged in numerous Communist activities both in this country and abroad; and is suspected of being a Communist espionage agent.

V.

I have reason to believe, on the balance of all the evidence, that the applicant is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement. I have reached this conclusion on the basis of the foregoing findings together with the confidential information relating thereto, as well as other confidential information contained in the files of the Department of State, the disclosure of which might prejudice the conduct of United States foreign relations. I have also taken into consideration the serious doubts as to applicant's general credibility raised by the applicant's denial in the face of convincing contrary evidence, including the oral testimony of three apparently disinterested witnesses of ever having been present at 65 Morton Street. The passport application of Weldon Bruce Dayton is therefore denied under Section 51.135 (c) of the Passport Regulations (22 CFR 51.135 (c)), and because the issuance of a passport would be contrary to the national interest.

VI.

The confidential information referred to in paragraphs I (b), II (b), III (b) and IV (b) above relates to the internal security of the United States. The substance of this confidential information was disclosed to the applicant during the consideration of his passport application. To disclose publicly the sources and details of this information would, in my judgment, be detrimental to our national interest by compromising investigative sources and methods and seriously interfering with the ability of this Department and the Executive Branch to obtain reliable information affecting our internal security. Moreover, it would have an adverse effect upon our ability to obtain and utilize information from sources abroad and interfere with our established relationships in the security and intelligence area; and might, with respect to information referred to in paragraph V, prejudice the interest of United States foreign relations.

5. *Further proceedings in the courts below.*—When the case returned to the District Court, the court again granted summary judgment for the respondent and dismissed the complaint (R. 289–290; see also R. 280–289).

The Court of Appeals affirmed, Judge Fahy dissenting (R. 303). In the majority opinion, Judge Prettyman noted that the *Briehl* decision (see No. 481, this Term) upheld both the validity of the Passport Regulations (which he held were "meticulously complied with" in this case (R. 300)) and the authority of the Secretary to refuse to issue a passport to

an applicant found, as here, to be going abroad knowingly and wilfully to advance the Communist movement (R. 294). The opinion ruled that the Secretary's statement that the issuance of a passport to Dayton "would be contrary to the public interest" plainly meant the public interest in internal security and foreign affairs, in view of the Secretary's finding as to Dayton's purpose (R. 295). Turning to the Secretary's partial reliance upon confidential information, Judge Prettyman's opinion held that, in the circumstances of this case and in the light of the Secretary's stated reasons for non-disclosure, the Secretary "need not disclose the information but he may act upon it" (R. 295), since liberty of travel is subject to limitation in the "community interest" (R. 298–299). Basing his conclusions upon "helpful guideposts in the principles laid down by the [Supreme] Court in different fields" (R. 295), notably in *United States* v. *Curtis-Wright Corp.*, 299 U. S. 304, and *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103 (R. 296–298), Judge Prettyman summarized the court's resolution of the problem as follows (R. 299):

> Americans always resent and oppose the deprivation of liberty upon the basis of undisclosed information. We do so in this area. We would not agree to it except in necessitous circumstances of public concern. Such circumstances are here.

Judge Fahy's dissenting opinion did not reach the issue of confidential information. Adhering to the views expressed in his *Briehl* dissent—that under 8

U. S. C. 1185 the Secretary has "no greater power * * * than to deny the passport when necessary 'to prevent the reasonable likelihood of harm to our national defense or to the conduct of our foreign affairs' "—he declined to interpret the Secretary's findings in this case as "framed within those criteria" (R. 301). He read the finding as to Dayton's purpose as "subsidiary to the basic finding framed in terms of the 'national interest' "; as a result, he said, the denial had "not focused upon the question whether the grant would be likely to cause harm to national defense or to the conduct of foreign affairs". He therefore felt that the case should be returned to the Secretary for further consideration (R. 302).

SUMMARY OF ARGUMENT

I

A. The issues of substantive and procedural due process raised in this case by petitioner in connection with the denial of his passport application must be considered in the light of all the circumstances, including the nature of the problem dealt with and the scope of the powers exercised. The travel control program authorized by 8 U. S. C. 1185 represents a joint congressional and Executive exercise of the war power and the foreign affairs power. History shows that, where the national interest requires the invocation of these powers in such a way as to impinge upon the interests of individual citizens, the courts will go far in permitting limitations and procedures with respect to such individuals which would not be accepted if lesser national interests were at stake.

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B. Here, the very purpose of Congress in enacting the travel control statute was to permit the Secretary of State to exercise emergency travel control authority, through passport denials, upon a lesser evidentiary basis than that which petitioner contends is required by the Due Process Clause. The history of the statute reveals that Congress sought to overcome the existing inability of the Government to restrict the travel of individual citizens except in cases where it could obtain—and divulge in open court—evidence of past criminal activity sufficient to support a criminal conviction resulting in incarceration. The national interest required, however, that the Government be permitted to prevent the border-crossing of persons reasonably suspected of engaging in activity on behalf of a hostile foreign power in times of peril, and it was for this reason that the statute was originally passed in 1918 and subsequently reenacted. Even without the legislative history, however, it is plain that administrative travel restriction (as distinguished from incarceration), designed to avert reasonably predictable future activity inimical to the national security, serves no legitimate purpose if its enforcement must depend upon the quantum and type of evidence required by a judicial trial, whether criminal or civil. Today, these travel restrictions are enforced under regulations, self-imposed by the Secretary of State, which provide numerous protections of both a procedural and substantive nature for the benefit of passport applicants. As our brief in No. 481 shows, the general travel control program, as envisaged by Congress and as established by the Secretary of State, is constitutional.

II

A. The Secretary's finding that he has "reason to believe, on the balance of all the evidence, that [petitioner] is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement", is not violative of substantive due process as unconstitutionally vague. Read as a whole and in light of the finding of scienter and purpose, the words of the finding are clear and meaningful. The congressional definition of the "Communist movement" contained in the Internal Security Act of 1950 has been cited by this and other courts, and the meaning of the word "advance" is unmistakable in its context. Nor is there any infirmity in the Secretary's further finding that the "issuance of a passport would be contrary to the national interest" in this case. That finding—drawing its content from the statute, the Presidenial proclamations, the regulation, and the findings—does not detract from the specific finding as to petitioner's purpose. Both findings relate to present intent and possible future conduct; in this "speculative" area, findings of this type are more than adequate, as is the decisional standard of "reason to believe, on the balance of all the evidence".

B. The ultimate conclusions just discussed are, moreover, amply supported by the Secretary's findings and the record in this case, and are immune from reversal on the ground that they were arbitrary or capricious. The pattern of petitioner's activities and associations reflected in the findings must be

read together with the fact that the Secretary's ultimate conclusion takes into consideration undisclosed evidence relating to the conduct of foreign affairs. It must be assumed that this information fills in any possible hiatus between the factual findings and the ultimate conclusion. But even without this assumption, the findings as to petitioner's past, taken all together, give rise to a legitimate inference that petitioner has been closely connected with the Communist movement. This is particularly true when they are read in the light of the Secretary's legitimate "serious doubts" as to petitioner's general credibility, caused by his denial, in the face of credible contrary testimony by three apparently disinterested witnesses, of his presence at 65 Morton Street—a fact which could readily form a link in a chain of evidence incriminating under the espionage laws. Petitioner's attack upon the credibility of these witnesses is not supported by the record. Nor is there merit to his claim that the denial of his application upon the grounds stated by the Secretary constitutes a judgment of "guilt by association". There is more than mere "association" revealed by the record and findings; in any event, associations may lawfully be considered in making an administrative determination of the kind here made by the Secretary. Cf. *Adler* v. *Board of Education,* 342 U. S. 485, 493. While petitioner could possibly be, on the record befor this Court, the innocent victim of circumstance he claims to be, it was certainly not arbitrary nor capricious for the Secretary to conclude to the contrary.

III

A. In relying in part upon information and sources and details of information undisclosed to petitioner, the Secretary did not violate petitioner's rights to procedural due process. The record reveals that, with the exception of information undisclosed because to do so might prejudice foreign relations, petitioner had adequate opportunity to know the grounds on which the denial of his application was ultimately based and to attempt to explain or refute the facts underlying those grounds. It is clear that petitioner was aware, at an early stage in the proceedings, of virtually all of the information available to the Department of State and relating to petitioner's past which he could best hope to refute—*i. e.*, his own past activities and associations—as contrasted with the sources and details of information relating to persons and organizations with whom he had associated. Petitioner admitted all but two of the alleged activities and associations, and with respect to his two denials, the Department confronted petitioner with three disinterested witnesses and permitted cross-examination. The non-disclosure of the sources and details of the other information did not unduly hamper petitioner's presentation of his case.

B. Such withholding of sources and details of information as is revealed by this record was justified by the considerations on which the Secretary of State acted. The conflicting interests are such that petitioner's interest in full disclosure must be accommodated to meet the national interest requiring non-disclosure, for petitioner's right is not absolute. The suggestion

that the Secretary resolve the conflict by issuing a passport, thus protecting the government's interests in non-disclosure, is in effect a suggestion that the Secretary choose to abandon the travel control system, found essential to the national security by Congress and the President, in order to preserve the Government's intelligence system and certain aspects of its foreign relations. But petitioner's interests are not such as to require so drastic a choice by the Secretary.

Clearly, the Secretary has stated adequate reasons for withholding the information, sources, and details here sought. To require him to disclose information which may not be disclosed without prejudice to the interest of foreign relations would be unprecedented. As to the non-disclosure of sources and details of information relating to internal security, the reasons stated for such non-disclosure are plainly adequate in light of the decisions of this and other courts, especially since it is the Secretary himself who has reviewed the information and held that it may not be disclosed. The Government has a legitimate interest in maintaining investigative sources and methods, as well as security and intelligence relations, which are essential to keeping itself informed of matters relating to internal security. This is especially true in this particular case, where the internal security considerations relate to possible espionage on behalf of an adverse foreign power.

Where, as here, Congress has authorized the use of undisclosed information in an emergency situation, an individual's claim to unlimited confrontation, based essentially upon the Sixth Amendment, is not suffi-

cient to overcome the national interest. This Court has permitted the use of such information in other areas, and in both judicial and administrative proceedings, particularly in cases involving the war power and the conduct of foreign relations. And the right of the Secretary of State to act upon such information in passport proceedings involving travel control has been specifically recognized by competent authorities. The case of *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9), strongly relied upon by petitioner, is plainly distinguishable and is not persuasive to the contrary.

Moreover, there are no practical alternatives to the use of undisclosed sources and information in the operation of the travel control program. Consequently, petitioner in fact asks the Court not only to drain the travel control statute of its vitality but to place permanently disabling restrictions upon the Government's power to enforce reasonable emergency travel controls.

IV

As we have demonstrated elsewhere in this brief and in our brief in No. 481, the denial of a passport to petitioner does not violate his rights under the First Amendment.

ARGUMENT

In the *Kent* and *Briehl* case, No. 481, the administrative processing of the petitioners' passport applications was halted in the Passport Office due to the petitioners' refusal to submit affidavits relating to Communist Party membership. The basic issue raised in that case is whether the Secretary of State

is validly authorized by statute and the Constitution to refuse to issue passports, so as to restrict foreign travel, for reasons relating to activity in the Communist movement, including Communist Party membership.

In the present case, petitioner Dayton complied with the affidavit requirement at issue in *Kent* and *Briehl*. Accordingly, the processing of Dayton's application continued in accordance with the pertinent passport regulations, through hearings and a final decision on the merits by the Secretary of State. The basic issue raised in *Kent* and *Briehl* is, of course, of fundamental importance in this case, for, unless the Secretary is authorized to deny passports on grounds related to Communist activity, the denial of Dayton's application cannot stand. Our arguments in this brief are therefore premised upon those in our brief in *Kent* and *Briehl* as to the basic authority of the Secretary of State.

The additional questions in this case involve, in brief, the validity of the procedures accorded petitioner in the processing of his passport application, and the validity of the ultimate denial of the application on its merits by the Secretary of State. These are primarily questions of due process, although First Amendment considerations are also raised and will be discussed. Applying the yardsticks traditionally employed by this Court in determining the requirements of due process in a particular case, we submit that the denial of petitioner's passport application is constitutionally sustainable. In reaching this conclusion, we take into consideration the nature of the Due Process

Clause, the scope of the war power and foreign affairs power here involved, the aim of Congress in enacting the travel control statute, and the standards, procedures, findings, and conclusions adopted and applied in this case.

I

INTRODUCTION—DUE PROCESS AND THE CONTROL OF CITIZEN TRAVEL IN TIMES OF EMERGENCY

The Secretary's denial, after extensive administrative proceedings, of petitioner's passport application raises two general types of problems: (*a*) substantive—relating to the grounds for denial, and the ultimate sufficiency of the showing that those grounds exist in petitioner's case; and (*b*) procedural—relating to the fairness of the administrative proceedings. Since petitioner claims that, on both grounds, he has been denied due process, the Secretary's action must be tested by the standards which are appropriate for the administrative restriction of foreign travel in emergency times. It will therefore be helpful, at the outset, briefly to recall the relationship of due process to the defense power and the foreign affairs power which are being exercised in this case, and also to set forth the specific purposes of Congress in establishing an *administrative* control of foreign travel, rather than a penal system to be enforced wholly by means of the criminal code.

A. DUE PROCESS TAKES ACCOUNT OF THE NATURE OF THE PROBLEM AND OF THE POWERS EXERCISED

The court below set its decision on the requirements of due process within the frame of this Court's hold-

ing in *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 391 (R. 295–296). Paraphrased slightly to meet the present case, that holding was as follows:

> * * * The Constitution does not speak of freedom of [travel]. It speaks of liberty and prohibits the deprivation of liberty without due process of law. * * * But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

Mr. Justice Holmes observed in *Moyer* v. *Peabody,* 212 U. S. 78, 84, that "it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation." See also, *e. g., Wolf* v. *Colorado,* 338 U. S. 25, 27; *Federal Communications Comm'n* v. *W. J. R.,* 337 U. S. 265, 275; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 163; *Betts* v. *Brady,* 316 U. S. 455, 462; *N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 341. While the Due Process Clause, in common with other provisions of the Constitution, creates rights in individual citizens, the nature of those rights is not invariable, for the Constitution also recognizes equally vital powers in the Government, such as the commerce and the war powers. When these rights and powers require accommodation, the problems posed can be resolved only

by "balancing the conflicting individual and national interests involved." *American Communications Ass'n v. Douds*, 339 U. S. 382, 410.

The circumstances to be considered in balancing the conflicting individual and national interests in this case necessarily include the nature of the two powers here exercised in concert by the Congress and the Executive:—the defense and war power, and the foreign affairs power. Our brief in No. 481 calls attention to the broad scope of the war and defense power as supporting the validity, whether during time of actual war or of proclaimed national emergency, of the travel control statute (8 U. S. C. 1185) (pp. 89 *ff*). History shows that where the national interest requires the invocation of that power, the courts will go far in permitting limitations and procedures which would not be accepted if lesser national interests were at stake. *E. g., Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214; cf. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591.

As with the war power, the importance of the foreign affairs power in assaying the travel control program has been discussed in our brief in No. 481. Again, the nature of that power, the peculiar role of the President and the Secretary of State in its exercise, and their broad discretion in foreign affairs matters, are highly relevant to the due process questions presented in this case. This Court set the key in *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 319–320, when it said:

> It is important to bear in mind that we are here dealing not alone with an authority vested

> in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.

Due process in a case like this necessarily takes its character and its color from the problems to be faced, the national powers being exercised, the alternative solutions, and the teachings of our history.

B. THE PURPOSE OF CONGRESS IN ENACTING THE TRAVEL CONTROL STATUTE WAS TO PERMIT THE SECRETARY TO REFUSE TO ISSUE A PASSPORT, AND THUS TO RESTRICT TRAVEL, ON EVIDENCE SATISFACTORY TO HIM, EVEN THOUGH SUCH EVIDENCE WOULD BE INSUFFICIENT TO SUPPORT A CRIMINAL CONVICTION

1. A further potent element in measuring due process in this case is the specific purpose of Congress in enacting the travel control statute (8 U. S. C. 1185) and the situation which that statute was designed to remedy. Both these factors are peculiarly relevant to petitioner's principal objections here: —that the Secretary's findings are lacking in proper evidentiary support, primarily because they are in part premised upon information undisclosed to petitioner and the courts; and that the Secretary's findings did not compel him to conclude that petitioner wishes to travel abroad for nefarious purposes. The history of the travel control statute shows that it was enacted precisely because, prior to its enactment, evidentiary requirements such as those petitioner urges prevented the effective restriction of travel necessary in an emergency situation.

The Brief for the Respondent in No. 481 shows that Congress, in choosing passport control as the means

of effectuating travel control, utilized not only congressional power but also the Secretary's recognized discretion in passport matters, leaving him wide latitude to determine, in the light of the national interest, which individual citizens would be granted passports—and thus be permitted to travel abroad—and which citizens would be restrained by the withholding of passports (pp. 29 *ff*). Congress acted on the assumption that, in the absence of such a statute, no person suspected of espionage, subversion, or other activities detrimental to the national safety could be prevented from leaving the country—no matter how strong the suspicion—unless the Executive Branch took him into custody and produced competent evidence of past criminal activity sufficient to withstand a writ of habeas corpus and to justify criminal prosecution.

It was precisely this evidentiary obstacle which the 1918 Act sought to overcome. Congress envisaged that, in issuing passports under the statute's provisions and in the light of emergency conditions, the Secretary of State would act as in his best judgment the situation seemed to require. He was not to be bound by technical rules of evidence, nor was he to deny a passport only in those cases where the substantial evidence in a public record seemed sufficient to satisfy a court that such a restraint was justified.

This was made clear in the congressional statement of the conditions which the Act was designed to remedy, contained in the Report of the House Foreign Affairs Committee which accompanied the bill enacted

into law in 1918 (H. Rept. No. 485, 65th Cong., 2d Sess., pp. 2–3; emphasis added):

> The bill is intended to stop an important gap in the war legislation of the United States. * * *
>
> * * * * * *
>
> * * * That some supervision of travel by American citizens is essential appeared from statements made before the committee at the hearing upon the bill. One case was mentioned of a United States citizen who recently returned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was *strong suspicion* that he came to the United States for no proper purpose. Nevertheless *not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so. The known facts in his case are not sufficient to warrant the institution of a criminal prosecution,* and in any event *the difficulty of securing legal evidence from the place of his activities in Europe may easily be imagined.*
>
> * * * * * *
>
> *It is essential to meet the situation that the Executive should have wide discretion and wide authority of action.* No one can foresee the different means which may be adopted by hostile nations to secure military information or spread propaganda and discontent. * * *
>
> The Committee was informed by representatives of the executive departments that the need for prompt legislation of the character suggested is most pressing. There have recently been numerous *suspicious* departures for Cuba which it was *impossible to prevent.* Other indi-

vidual cases of entry and departure at various points have excited the greatest anxiety. This is particularly true in respect of the Mexican border, passage across which can not legally be restricted for many types of persons *reasonably suspected* of aiding Germany's purposes.

When the bill came to the House floor for debate Congressman Flood, the committee representative, stated (emphasis added):

> * * * the Government is now very much hampered by lack of authority to control the travel to and from this country, even of people *suspected* of not being loyal, and even of those whom they *suspect* of being in the employ of enemy governments. [56 Cong. Rec. 6029.]
>
> * * * * *
>
> There are [persons] whose loyalty is *suspected*, but there is *not enough evidence to convict them in a court of justice.* [*Id.* at 6064.]
>
> * * * * *
>
> * * * Our ports are open, so far as the law is concerned, to alien friends, citizens, and neutrals, to come and go at will and pleasure, and that notwithstanding the Government may *suspect* the conduct and the intention of the individuals who come and go. [*Id.* at 6065.]
>
> * * * * *
>
> * * * If there are American citizens in foreign lands * * * [whose] conduct subjects them to charges of disloyalty or treason they should be properly dealt with. But many of them have conducted themselves so that the charge of disloyalty or treason *could not be sustained in a court of justice*, and yet our Government knows that they are not loyal and

> that their presence here would be dangerous to the country. [*Id.* at 6066.]

Congressman Huddleston objected to the bill's provision for controls upon entry (as distinguished from those upon departure)[11] which Congressman Flood was discussing in the last quoted paragraph. Congressman Huddleston therefore introduced an amendment which would strike the requirement of a passport for entry into the United States by a citizen (56 Cong. Rec. 6063), stating that while he was "willing to concede" that exit should be controlled in the manner contemplated (*id.* at 6064), he objected to entry controls (*id.* at 6063; emphasis added):

> * * * When we pass this bill we should understand once and for all that we are clothing some little subordinate far down the line, who perhaps has never seen the President, with power to bar an American citizen out of his native country *upon a mere suspicion and without a syllable of proof against him.*

After debate, the amendment was defeated, 45 to 5 (*id.* at 6067).

In view of the legislative purpose of authorizing travel controls on evidence satisfactory to the Secretary, and in the light of the situation as outlined in the

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[11] The requirement of a passport for entry into the United States is, of course, not at issue in this case, since petitioner is in this country and wishes a passport in order to depart. In any event, the general practice of the Department of State in the case of passport applicants or holders abroad found to come within the provisions of Section 51.135 of the regulations is to issue or validate a passport good only for immediate return to the United States, thus permitting re-entry. See 22 CFR, 1956 Supp., 51.135, preamble, App. *infra*, p. 108.

debates and committee report, it is hardly surprising that Congress gave wide discretion to the Executive and failed to require evidentiary hearings or to specify other procedural rules for the operation of the program. Congress did not consider that such limitations were constitutionally required in the circumstances in which the bill was enacted; indeed, such fetters would clearly have been inconsistent with the legislative intent and the finding that "[s]wift Executive action is the only effective counterstroke" to the dangers posed (H. Rept. No. 485, 65th Cong., 2d Sess., p. 3). Consequently, when President Wilson invoked the statute he proclaimed that "[n]o citizen of the United States shall receive a passport entitling him to leave or enter the United States, unless it shall *affirmatively appear that there are adequate reasons for such departure or entry* and that such departure or entry is *not prejudicial to the interests of the United States.*"[13] No definition of the "interests of the United States" was provided, nor were passport hearing procedures established.

The statute was amended in 1941 with knowledge of this history and administrative interpretation,[15] and was reenacted in 1952, as amended to permit invocation of the travel restrictions during times of proclaimed national emergency as well as during wartime.[16] This is the statute under which the present system of travel controls operates. In the light of its

[13] Proc. No. 1473, August 8, 1918, Section 1, 40 Stat. 1829, 1831; emphasis added.

[15] See Brief for the Respondent in No. 481, pp. 49–51.

[16] See *id.* at p. 52.

history, and particularly of the 1918 committee report (*supra,* pp. 38–39), the statute must read as giving the Secretary of State "wide discretion and wide authority of action," and as enjoining upon him the duty of preventing the departure and entry of persons "reasonably suspected" of aiding a hostile foreign power, during time of war or proclaimed emergency, even though the "known facts in [a particular] case are not sufficient to warrant the institution of criminal prosecution, and * * * the difficulty of securing legal evidence * * *" makes such prosecution impossible.

As we have noted, Congress in 1918 did not impose limitations of either a substantive or procedural nature upon the exercise of Executive discretion, other than those noted in the Brief for the Respondent in No. 481, at pp. 91–97, nor did it contemplate or require that the Executive impose such limitations upon itself.[15] Nevertheless, the Secretary of State in 1952 adopted the present regulations (App. *infra,* pp. 108–117), setting forth substantive criteria for the exercise of his discretion and procedural protections for the benefit of passport applicants. The regulations (which are discussed in greater detail *infra,* pp. 46 *ff*) establish carefully defined categories of persons to whom passports will be denied on grounds relating to activity,

[15] The latest reenactment of the statute as Section 215 of the Immigration and Nationality Act of 1952, Act of June 27, 1952, c. 477, Title II, c. 2, 66 Stat. 190, was passed before the promulgation, on August 28, 1952, of the regulations here in question (see App. *infra,* pp. 108–117) but did not become effective until December 24, 1952 (66 Stat. 281).

present or potential, on behalf of the Communist movement (22 CFR, 1956 Supp., 51.135); if an applicant cannot be found to come within these categories he will not be denied a passport on grounds related to Communist activity.[16] There are provided procedures for informal hearings, appeal resulting in formal hearings before a board of officers appointed by the Secretary, and a final decision by the Secretary himself (see the regulations, App. *infra*, pp. 110–117). The Secretary's decision under the subsection here involved is made not on mere "suspicion" but upon "reason to believe, on the balance of all the evidence" (22 CFR, 1956 Supp., 51.135 (c); App., *infra*, p. 109); in making or reviewing findings of fact made in the course of processing the application, the fact-finders are to "be convinced by a preponderance of the evidence, as would a trial court in a civil case" (22 CFR, 1956 Supp., 51.141; App. *infra*, p. 111).

These self-imposed restrictions of the Secretary represent a reasoned adaptation of the original congressional will to the present conditions under which the travel controls operate, according more liberal consideration to the rights of individuals, justified by the relatively lessened urgency of the international situation.

2. Against this background, the fundamental issue in the present case comes down to this: whether a statute designed to permit travel controls on the grounds and evidentiary basis contemplated by Congress, as modi-

[16] See *Boudin* v. *Dulles*, 235 F. 2d 532 (C. A. D. C.); *Dayton* v. *Dulles*, 237 F. 2d 43 (C. A. D. C.) (first appeal).

fied and liberalized by the Secretary of State to meet present conditions, is constitutional. In our view, if the Secretary is constitutionally permitted to restrict travel at all, he is permitted to do so for the reasons, in the manner, and on the quantum and kind of evidence here relied upon. For travel controls are justifiable only if they secure a legitimate governmental objective which cannot properly be accomplished in another way. That objective is to prevent the departure and entry of citizens when such departure or entry is reasonably likely to be inimical to the national safety in times of peril. The same objective can be secured by obtaining a conviction based upon criminal activity in aid of a foreign power and placing the person whose movements are to be restrained behind bars—*if* the Government has sufficient evidence of *past* criminal conduct to secure such a conviction, and *if* the evidence is such that it may with safety be revealed to the defendant and to the public at large in open court. If such evidence is in fact available, it is of course the duty of the Government to seek an indictment and conviction.

But where the quantum of proof, though persuasive, does not meet the stringent standards for criminal conviction; or where the evidence may not, consistent with the national interest, be placed in an open record; or where the problem is in the future not the past—it is then that the emergency travel control power, as distinguished from the power to punish for past criminal activity, performs its unique role. It does so by making possible the imposition of restraints upon the individual which, while they may be imposed by the Government under standards less stringent than

those of a criminal prosecution, are at the same time qualitatively far less severe than the restraints which result from a criminal conviction.

On the other hand, to impose substantive and evidentiary standards approaching those of criminal trials upon administrative passport denials resulting in travel control would nullify, as a practical matter, the concept of travel control as a distinct and legitimate power of Government designed to accomplish a limited goal. For this administrative function cannot be performed under the standards applicable to judicial trials. To demand such requirements may not be done without nullifying the statute itself and the congressional will which the statute implements. See also *infra,* pp. 65 *ff.*

This is not to say, of course, that the congressional purpose so clearly expressed complete forecloses this Court, for "[i]n light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power * * *" (*Galvan* v. *Press,* 347 U. S. 522, 530), it remains to the Court to determine the validity of the congressional aims and the remedies employed in a particular case. But, as we have pointed out in this Introduction, *supra,* pp. 33 *ff*, the legislative purpose and the situation to be remedied are of singular importance in deciding whether the process accorded to petitioner was that due him under the Constitution, in the light of all the circumstances.[17]

[17] See also our brief in No. 481, at pp. 43–45, 60 *ff.*

II

THERE HAS BEEN NO VIOLATION OF PETITIONER'S RIGHTS OF SUBSTANTIVE DUE PROCESS

We discuss, *first*, the claim that the particular regulation on the basis of which the Secretary denied petitioner a passport is unconstitutionally vague; and, *second*, the argument that the Secretary could not fairly conclude, on the basis of his own findings, that petitioner's case falls within that regulation.

A. THE REGULATION IS NOT UNCONSTITUTIONALLY VAGUE IN PROVIDING FOR THE DENIAL OF PASSPORTS TO PERSONS FOUND TO BE "GOING ABROAD TO ENGAGE IN ACTIVITIES WHICH WILL ADVANCE THE COMMUNIST MOVEMENT FOR THE PURPOSE, KNOWINGLY AND WILFULLY OF ADVANCING THAT MOVEMENT"

Petitioner argues that due process has been denied him "because of the vagueness of the grounds on which the Secretary's decision is based" (Pet. Br. 46, 47–51). That decision states, in the language of Section 51.135 (c) of the regulations (App. *infra*, p. 109), that the Secretary has "reason to believe, on the balance of all the evidence, that [petitioner] is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement"; and, further, that the application is "denied under Section 51.135 (c) * * *, and because the issuance of a passport would be contrary to the national interest" (R. 278, *supra*, p. 22). Petitioner's specific objections are to the words and phrases "Communist movement", "advance", and "contrary to the national interest", which, he argues, are "so hopelessly vague that they cannot satisfy due process requirements" (Pet. Br.

47). We submit that Section 51.135 (c) establishes a clear, meaningful, and valid category of persons to whom passports are to be denied in the exercise of the Secretary's discretion, and that the Secretary's additional statement that the issuance of a passport to petitioner "would be contrary to the national interest" is likewise valid and in no way detracts from the legality of the denial of the application under the grounds specifically set forth in Section 51.135 (c).[18]

1. The contention that the words "Communist movement" are "hopelessly vague" and that they have significantly been left undefined in the Internal Security Act of 1950[19] (Pet. Br. 47, note 22) cannot stand against this Court's own recent statement (*Galvan* v. *Press*, 347 U. S. 522, 529; emphasis added):

> * * * On the basis of extensive investigation Congress made many findings [in the Internal Security Act of 1950], including that in § 2 (1) of the Act that the *"Communist movement* * * * *is* a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary to establish a Communist totalitarian dictatorship" * * *

[18] In our brief in No. 481, we show (at pp. 60 *ff*) the basis for denying passports to, and thus restricting the travel of, persons who are directly connected with the Communist movement. That discussion is, of course, directly relevant to the present argument that the Secretary's denial in this case did not violate any of petitioner's rights.

[19] 64 Stat. 987, 50 U. S. C. 781, *et seq.*

The court below, stating that "Congress defined 'the world Communist movement' in several paragraphs of Section 2 of the statute [*i. e.*, the Internal Security Act of 1950]", has likewise quoted this definition. *Communist Party of the United States* v. *Subversive Activities Control Board,* 223 F. 2d 531, 542 (C. A. D. C.), see also 540, reversed on other grounds, 351 U. S. 155. And in *Carlson* v. *Landon,* 342 U. S. 524, 535, note 21, this Court quoted subsection (15) of the same Section 2, which begins with the sentence: "The *Communist movement in the United States is* an organization numbering thousands of adherents, rigidly and ruthlessly disciplined." [Emphasis added.] The balance of the fifteen subsections of Section 2 further define the term to which petitioner objects, define the terms used in the definition, as well as describe and analyze the nature, operations and characteristics of the "Communist movement" and its component parts. Further relevant definitions are set forth in subsections (2)–(5) and (14)–(19) of Section 3 of the Act (50 U. S. C. 782).[20] To say that the term "Communist movement" is "no more meaningful than the epithets 'un-American' or 'subversive propaganda' "[21] (Pet. Br. 47) is to put on blinders against

[20] See also Sections 2, 7 and 10 of the Communist Control Act of 1954, Act of August 24, 1954, c. 886, 68 Stat. 775, 777, 778, 50 U. S. C., Supp. IV, 841, 782 and 792a, for further pertinent references to the "Communist movement".

[21] Petitioner cites *United States* v. *Peck*, 154 F. Supp. 603 (D. D. C.) in support of this proposition. The court there found nothing vague about the phrase "Communist movement"; to the contrary, the court said: "* * * the Communist movement now constitutes a criminal conspiracy * * *" (*id.* at 608). At issue was a Senate resolution authorizing investiga-

the facts of life, the ordinary use of English terms, and congressional definitions recognized by this and other courts.

2. Petitioner plucks the word *"advance"* from the phrase "going abroad to engage in activities which will *advance* the Communist movement, for the purpose, knowingly and wilfully of advancing that movement", and claims that that word, too, is so vague as to invalidate the regulation and the finding. He rests his contention on the fact that other courts in other circumstances have found that questions as to whether a witness was in the past a "sympathizer", a "follower of the Communist line", or a "promoter of Communist interest" were too vague to support criminal indictments *for perjury* (Pet. Br. 47–48). But the demands and limitations of a criminal perjury case are far different from those for administrative regulation, and the criteria for validity vary accordingly. In the present context, the meaning of "advance" is plain, particularly in view of the finding of reason to believe that petitioner is going abroad "knowingly and wilfully" to engage in the proscribed activities. Cf. *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 412–413. Clearly, the term

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tion of "the extent * * * of subversive activities in the United States, * * * including, *but not limited to*, espionage, sabotage, and infiltration by persons * * * under the domination of the foreign government or organizations controlling the world *Communist movement* * * *" (*id.* at 608–609, note 19; emphasis added). In finding this resolution void for vagueness, the court did so precisely because the term "subversive" was *not* limited to the factors enumerated in the "including but not limited to" clause (*id.* at 609).

"advance" means deliberately, intentionally, and purposefully to support, promote, aid, help, and render assistance to the Communist movement.

3. Petitioner's further argument against the Secretary's statement that "issuance of a passport would be contrary to the national interest" is also deficient. Again, the statement must be read in both its immediate and legal contexts. The preamble to Section 51.135, which gives the setting for subsection (c) (the subsection here involved, *supra,* p. 22), states that the purpose of passport denials under the subsections of that regulation is "to promote the *national interest* by assuring that persons who support the world Communist movement * * * may not, through use of United States passports, further the purposes of that movement * * *" (emphasis added). When, as here, a denial results in travel restriction, it is because the statutory restrictions of 8 U. S. C. 1185, which are subject to invocation in time of emergency "[w]hen * * * the President shall find that the *interests of the United States* require * * * ", are now in force under a Presidential Proclamation declaring "that the *interests of the United States* require * * *" the imposition of the statutory controls, in view of the "exigencies of the international situation and the national defense" underlying the existing state of emergency.[22] The relevant "national interest" is thus clearly that of guarding the nation from the internal and external threats posed by the international Com-

[22] Proc. No. 3004, January 17, 1953, 67 Stat. C31; see Brief for the Respondent in No. 481, App., pp. 105–108.

munist movement. As Judge Prettyman stated below (R. 295):

> It is true that the Secretary did not here say in specific terms that he denied the passport because to grant it would be detrimental to internal security or foreign relations. But surely, * * * when the Secretary, having made the finding as to Dayton's purpose, said that issuance of the passport would be contrary to the public interest, he meant the public interest in internal security and in foreign affairs. In the context of the record as it now is, in the light of the finding as to Dayton's purpose, "national interest" clearly means "internal security and foreign affairs". Any difference in meaning between those terms is of no moment here.

This holding is in accord with the decisions of this Court sustaining, as valid against charges of vagueness, standards of "public interest" in various contexts. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24; *United States* v. *Chemical Foundation*, 272 U. S. 1; *Avent* v. *United States*, 266 U. S. 127; *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 225–226.[23] The finding of the Secretary is

[23] In *Avent*, the Court noted that "The statute confines the power of the Commission to emergencies, and the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed" (266 U. S. at 130). In *New York Central Securities*, the Court held (287 U. S. at 24):

> * * * the criterion is the "public interest". It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it im-

no more invalid than would be a finding by the Federal Communications Commission denying a broadcasting license on stated grounds, adding that issuance of the license would not be in the "public interest". Cf. *National Broadcasting Co.* v. *United States, supra.*[24].

4. We add that the findings of the Secretary are to be read not only in their external context but as a unitary whole, including the finding of scienter and wilfullness. They are also to be read in the light of the congressional admonition that "the Executive should have wide discretion and wide authority of action" (H. Rept. No. 485, 65th Cong., 2d Sess., p. 3). This is particularly true at a time when Communist affiliation is "screened by ideological patterns and techniques of disguise that make it difficult to identify." *Wieman* v. *Updegraff*, 344 U. S. 183, 188.

Moreover, it must be remembered that these findings relate to present intent and future activities which *may* be engaged in, not to past activities which by their nature are objective facts, either existent or nonexistent. As Professor Jaffe has said, "The facts in

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poses, and the context of the provision in question show the contrary.

[24] We submit that Judge Fahy's dissent, stating that the finding under Section 51.135 (c) "is subsidiary to the basic finding framed in terms of the 'national interest'" (R. 302), clearly inverts the train of decision. It seems plain that the Secretary found that issuance of the passport would be contrary to the "national interest" *because* petitioner came within the provisions of Section 51.135 (c). Moreover, when Judge Fahy says that "in denying this passport, the issuing authority has not focused upon the question whether the grant would be likely to cause harm to national defense" (*ibid.*), he appears to ignore the context of the "national interest" finding.

a particular case as to the citizen's intention are inevitably speculative: all is to be done after the bird has flown".[25] In this "speculative" area the Secretary need not, and cannot, specify particular activities in which he believes petitioner will engage abroad in order to justify his findings as to petitioner's purpose (see Pet. Br. 46).

Nor is the fact that the Secretary's finding is premised upon his "reason to believe, on the balance of all the evidence" subject to valid objection. The House of Lords sustained a lesser standard for decision in a similar context:

> * * * as preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof.[26]

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[25] Jaffe, *The Right to Travel: The Passport Problem*, 35 Foreign Affairs 17, 26–27 (Oct. 1956).

[26] *Rex* v. *Halliday* (*Ex parte Zadig*) [1917], A. C. 260 at 275. The House of Lords was there enforcing an administrative regulation authorizing the Secretary of State, for the duration of World War I, not merely to restrict the travel of British subjects but to place them in detention camps whenever (p. 266) "* * * it appears to the Secretary of State that for securing the public safety or the defence of the realm it is expedient in view of the hostile origin or associations of any person that he shall be * * * interned in such place as may be specified * * *". In a case upholding a similar regular regulation in World War II, Lord Macmillan said (*Liversidge* v. *Anderson*, [1942] A. C. 206, 253):

> * * * I may also quote the words of Lord Finlay, L. C. in *Rex* v. *Halliday:* "It seems obvious that no tribunal for investigating the question whether circumstances of sus-

B. IT WAS NOT ARBITRARY OR CAPRICIOUS FOR THE SECRETARY TO CONCLUDE, ON THE BASIS OF HIS FINDINGS AND THE RECORD, THAT PETITIONER'S CASE CAME WITHIN THE TERMS OF THE REGULATION

Petitioner next argues that the ultimate conclusions just discussed (*supra,* pp. 46–53), assuming their validity as a ground for denial of a passport, are not rationally supported in this case by the factual findings set forth in the Secretary's Decision and Findings (*supra,* pp. 19–23), and are therefore violative of due process (Pet. Br. 52–60).[27] The argument in effect is that the Secretary could not, without being arbitrary or capricious, "have reason to believe, on the balance of all the evidence [as epitomized in the findings], that the applicant is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement" (R. 278).[28] We take issue, of course, with this position.

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picion exist warranting some restraint can be imagined less appropriate than a court of law." The question is one of preventive detention justified by reasonable probability, not of criminal conviction which can only be justified by legal evidence.

[27] As to the form of these findings, the Commission on Government Security, in recommending substantive and procedural changes in the administration of the passport program, has stated that "The findings and decision made by the Secretary in the *Dayton* case [*i. e.*, those here in issue] are in exactly the form the Commission contemplated in framing its recommendation". *Report of the Commission on Government Security* (1957), p. 491.

[28] Petitioner's argument on this point closes with a revelation that he has never actually accepted, even for purposes of argument, either the "reason to believe" standard for decision, or travel controls themselves, but instead has treated the problems posed, as he does generally throughout his brief, as if the stand-

1. Petitioner's argument is that even if a "pattern" emerges from the findings and related confidential information set forth in paragraphs Ia–IVa and Ib–IVb (R. 276–277, *supra*, pp. 19–22), and assuming "the truth of these findings and the existence and accuracy of the undisclosed information"[29] (Pet. Br. 53), such a pattern "cannot rationally lead to the conclusion that, in 1956, years later, petitioner's proposed trip to India" was for the purposes found by the Secretary (Pet. Br. 60). This contention is premised upon a misreading of the stated bases for the Secretary's conclusion, which was reached "on the basis of" three elements, not two:—"[1] the foregoing findings [Ia–IVa] together with [2] the confidential information relating thereto [Ib–IVb], *as well as* [3] *other confidential information contained in the files of the Department*

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ards were those of a criminal conviction for past unlawful acts. Thus, he states (Pet. Br. 60) that "No decision of this Court sanctions" "the Government's detention of citizens for preventive purposes rather than as a preliminary to criminal proceedings based upon indictment for past unlawful activities, and on suspicion alone and without evidence of guilt". As we have indicated (*supra*, pp. 42–43, 52–53), we support the intermediate ground between "suspicion" and "proof beyond a reasonable doubt"—*i. e.*, the adequacy, on judicial review under an "arbitrary or capricious" standard, of the Secretary's "reason to believe" that petitioner is going abroad for the proscribed purposes. The question before the Court is whether, in reaching this conclusion, the Secretary "so far violated constitutional prescriptions or specific congressional limitations as to cast his action outside the exceedingly broad boundaries within which he is free to act without judicial review". Prettyman, J., in *Briehl*, R. 181 in No. 481.

[29] There is no substance to petitioner's suggestion elsewhere that the Secretary of State has falsely stated the existence of confidential information—"we cannot, of course, know * * * whether the information referred to even exists" (Pet. Br. 35).

of State, the disclosure of which might prejudice the conduct of United States foreign relations" (R. 278; emphasis added). The substance of this last information—a significant factor wholly ignored by petitioner—has for obvious reasons not been disclosed (see *infra*, pp. 75–77). If the Secretary may lawfully "not disclose [this] information but * * * may act upon it"—as we contend (*infra*, pp. 68–104) and as the court below has held (R. 295)—then it must be assumed that this information is sufficient to overcome whatever hiatus there may possibly be between the findings and information set forth in paragraphs I–IV and the conclusion stated in paragraph V. For, as petitioner himself points out (Pet. Br. 51–52), the Secretary's conclusion must be tested by the bases upon which he relied. If one factor is lawfully taken into account without disclosure, we may not simply ignore it, as petitioner does, but must assume that it fills in apparent deficiencies. Moreover, since this information may not be disclosed for reasons relating to foreign policy as opposed to internal security (compare paragraph VI, R. 278), it would not be unreasonable to assume that the undisclosed information relates more directly to the purpose of petitioner's proposed travel abroad to India—*i. e.*, to the ultimate conclusion—than to the past events encompassed by the prior findings.[30] In these circumstances, the Secre-

[30] It may be suggested that, if the Secretary had information in the foreign-relations area showing that petitioner's proposed travel was for the purposes stated, there was no need for the extensive consideration of petitioner's past; in such a case, the hearing procedures would be irrelevant to the basic ground for denial and would be designed solely to give "the appearance of

tary's conclusion is not subject to attack as arbitrary or capricious.

2. Even assuming, *arguendo,* however, that the existence of undisclosed foreign-affairs-information pertinent to petitioner's travel to India may be ignored, we submit that it would in any event have been permissible for the Secretary to have concluded, on the basis of the evidentiary findings and related confidential information (*i. e.,* Finding I–IV, *supra,* pp. 19–22), considered in the light of the "serious doubts" (R. 278) as to petitioner's general credibility raised by the testimony in the open record, that petitioner wished a passport in order to engage in the type of activities described in the Secretary's conclusion in Finding V (*supra,* p. 22).

The findings on the open record and related confidential information (R. 275–278; *supra,* pp. 19–22) reveal the following activities and associations of petitioner, extending over a considerable period of time:— during 1943 and 1944, chairmanship and active direction of a committee indicated to have been conceived and organized by Communist Party officials as a front for propaganda and espionage activities, and association therein with Frank and Sandra Collins and Rose Segure, all of whom were instrumental in or-

legal procedure" (*Jay* v. *Boyd*, 351 U. S. 345, 372, Mr. Justice Frankfurter, dissenting). But in view of the Secretary's Decision and Findings, it would appear that the information undisclosed for reasons relating to foreign affairs must have been information which would be significant in relation to petitioner's travel only if there were reason to believe that petitioner had been engaged in Communist activity in the past.

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ganizing the committee and all of whom were indicated to have been Communist Party members at the time; from 1946 to 1950, close association—including the sharing of his house for eight months—with Alfred Sarant, an active Communist Party member (and, as to 1943 and 1944, an admitted one), who was involved in the espionage apparatus of Julius Rosenberg, and who entered Mexico with petitioner's wife a week after the Federal Bureau of Investigation first subjected him to intensive interrogation; during 1949 and 1950, presence on more than one occasion in the apartment building at 65 Morton Street in which Sarant leased an apartment which was indicated to have been used by Rosenberg and other members of his spy ring for the microfilming of classified documents ultimately transmitted to a foreign power; and, finally, a close relationship since 1938 with Bernard Peters, the man responsible for petitioner's offer of employment in India and with whom petitioner, as a primary stated purpose of his proposed travel abroad, hopes to work in close collaboration, and a man indicated to have held Communist Party membership, to have engaged in numerous Communist activities in this country and abroad, and to be suspected of being a Communist espionage agent.

It is not unreasonable, we submit, to infer that these activities and associations are not the wholly unrelated and innocent facts which petitioner contends they are, but instead are linked by the common thread of petitioner's close connection with the Communist movement.

Coupled with this history of petitioner's past, as shown by the material before the Secretary (open and

closed), were the "serious doubts" as to petitioner's general credibility arising from his denial of a possibly incriminating fact in the face of contrary testimony, which gave impetus to the adverse inferences to be drawn from the foregoing combination of events. From the very beginning of the processing of petitioner's passport application, it was evident that "the determining factor in the case" was petitioner's "association with persons suspected of being part of the Rosenberg espionage ring and his alleged presence at" 65 Morton Street, the purported locale of microfilming activities of that ring (R. 44; see *supra*, p. 4). The importance of these allegations in the Department's deliberations in this case is emphasized by the exhaustive hearings held on the issue (R. 103–144, 167–270). Petitioner has, as he points out (Pet. Br. 55–56), staunchly and emphatically denied that he was ever near 65 Morton Street until taken there by FBI agents; petitioner would undoubtedly be the first to deny any possibility that he might be "mistaken" in these disavowals. It may therefore be assumed that petitioner's testimony in this regard is either absolutely true or absolutely false. On the other hand, three witnesses at the hearing positively identified petitioner under extensive cross-examination by petitioner's counsel, as having been present at 65 Morton Street.[31] Petitioner suggests no reason or motive which would cause these apparently disinterested witnesses deliberately to falsify their testimony under oath; he suggests instead that their testimony is "in-

[31] This testimony is further discussed *infra* at pp. 61–62.

credible" (Pet. Br. 56–58, note 26) and thus, apparently, mistaken.

Conceivably, the Secretary could have believed petitioner and thus treated all three apparently disinterested witnesses as "mistaken". But in believing the witnesses, the Secretary not only concluded the disputed fact issue—presence at 65 Morton Street—adversely to petitioner, but was further warranted in inferring that petitioner's testimony under oath was absolutely false on this material issue. Moreover, the disputed fact, while not *per se* incriminating (as petitioner so carefully points out (Pet. Br. 55–56)), was one which could readily form a link in a chain of evidence incriminating under the espionage laws.

Having concluded that petitioner testified falsely in this matter, it was not necessary for the Secretary to go further and to make specific findings as to petitioner's nefarious purposes or specific knowledge in relation to 65 Morton Street and espionage activities there, as petitioner suggests (*ibid.*). For this falsification was manifestly sufficient to give the Secretary, as he stated it did, "serious doubts as to [petitioner's] general credibility * * *" (R. 278); to cast doubt upon petitioner's protestations of innocence with regard to his other activities and associations; to strengthen the adverse conclusions inferable from the composite of those activities and associations; and to support an inference that, if petitioner would falsify his testimony in this important matter during the consideration of his passport application, he would use the passport in furtherance of Communist activities.

Taking all these considerations together, we submit that the Secretary's findings afford ample support for "reason to believe, on the balance of all the evidence," that petitioner was going to India for the illegitimate purposes stated by the Secretary.

3. Petitioner's contentions as to the inadequacy of the Secretary's findings are based in part upon the assertion that the testimony of the three Elwyns, the witnesses called to testify to petitioner's presence at 65 Morton Street (*supra*, pp. 13–17), is "incredible" and therefore furnishes no basis for the finding (R. 277) that petitioner was in fact at 65 Morton Street.[32] We submit that, on the contrary, this testimony is entirely credible. The record shows that, within eight months after the alleged furniture-moving incident (see *supra*, pp. 15–17), all three of these witnesses had identified petitioner as having been at 65 Morton Street. Prior to that time, at least one of the witnesses had made a photo identification of petitioner. Some five years later, at the formal hearing, these same witnesses repeated their identifications under oath and in petitioner's presence. It is true, as petitioner argues (though not to the degree he asserts), that the testimony at the hearing showed some confusion as to dates. But this is readily attributable to the passage of time, which is more apt to erode recollection of the date when an incident took place than of the details of the incident itself. And, as to the details of the various alleged encounters with petitioner at 65 Morton Street, the testimony was positive and pre-

[32] This is the only finding based upon the open record which petitioner contends is unsupported by that record.

cise and withstood the assaults of cross-examination. The testimony of these three disinterested witnesses almost compels the conclusion that petitioner had in fact been present at 65 Morton Street.

4. Petitioner's argument that "the Secretary's decision constitutes a judgment of guilt by association", because it is based upon petitioner's "innocent association with persons whose activities the Secretary finds culpable" (Pet. Br. 61), is quite unwarranted. First, there is more than mere "association" here; petitioner has been found to have been "*active* in" and "*Chairman* of" an organization indicated to have been "conceived and organized by Communist Party officials as a front for propaganda and espionage activities" (R. 276 *supra*, pp. 19–20; emphasis added). Secondly, in passing upon the propriety of considering "associations" in determining present character, this Court has said that "[o]ne's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps". *Adler* v. *Board of Education*, 342 U. S. 485, 493; cf. *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 391–392. Such associations have the same relevancy in a prediction of possible future conduct based upon an estimate of present intent.

We may concede, as petitioner urges, that "an official finding of vicarious *guilt* is impermissible", and that "'*guilt* is personal * * *'" (Pet. Br. 61; emphasis added), without agreeing that this principle vitiates the findings and conclusions in this case.

For the Secretary has not found petitioner "guilty" of anything, in the proper meaning of that term. In deciding passport applications, the Secretary does not sit as judge or jury to determine the truth or falsity of questions relating to past acts or past unlawful conduct. His sole function under the regulation is to make a reasoned judgment as to the likelihood that petitioner will deliberately engage in the future in proscribed activities abroad. There is no valid basis for restricting, in the manner suggested by petitioner, the indicia which the Secretary may take into account in making that judgment, as if this proceeding were a criminal trial of guilt or innocence. The Secretary must make a reasoned forecast of the applicant's conduct abroad, not a finding of his past derelictions. *Supra*, pp. 43–45, 52–53.

More important, perhaps, is the fact that petitioner's argument is posited upon the assumption that the Secretary must either accept at face value petitioner's protestations of innocence as to each separate allegation or must render separate findings that petitioner has knowingly participated in unlawful activity as to each such allegation; it is not sufficient, petitioner suggests, for the Secretary to have reason to believe, on the basis of *all* the evidence, that petitioner *is going abroad* for the purposes indicated. The suggestion appears to be that the Secretary must be able to support each and every individual piece of information which goes into the making of his present estimate by a preponderance of evidence. This, we submit, is not only a novel and unprecedented view of the stand-

ards of decision applicable to an administrator—or to any fact-finder—passing upon an application, but would obviously be a totally impracticable and unworkable requirement in the particular field of passport issuance in a time of national emergency proclaimed by the President.

We do not contend that, on the basis of the findings and the record before this Court—excluding the information relating to foreign relations—the Secretary could have reached *only* the conclusion he did reach. We do not argue that it is beyond the realm of possibility that petitioner is in fact what he claims to be:—a person entrapped by an unfortunate chain of circumstance coupled with mistaken identity or perjury; by an unfortunate but innocent penchant for associating with persons considered by Government officials to be involved in Communist activity and espionage; and by his misfortune in having headed an organization deemed by these officials to have been organized for purposes of Communist propaganda and espionage. But there is certainly the other alternative—and, we submit, a very grave one:—that petitioner is a person who has been, and very likely will again become, if given the opportunity, deeply involved in Communist activity, possibly including espionage. The choice between petitioner's version and a finding of reasonable grounds to believe that petitioner was going to India for illegitimate purposes was for the Secretary of State to make. What we do contend is that the record and findings justify as reasonable the choice made, and render the Secretary's

determination immune from reversal on the ground that it was arbitrary or capricious.

III

THERE HAS BEEN NO VIOLATION OF PETITIONER'S RIGHTS OF PROCEDURAL DUE PROCESS

We now turn to the issue of whether the administrative use of undisclosed information afforded petitioner due process. First, we show that such use of confidential information as has been made did not unduly prejudice petitioner's opportunity to establish his entitlement to a passport. In the next section (*infra,* pp. 68–104), we show that the use of such information was justified.

A. PETITIONER WAS NOT UNDULY PREJUDICED BY THE USE OF CONFIDENTIAL INFORMATION

The Statement, *supra,* pp. 3–18, outlines at some length the proceedings accorded petitioner in the Department of State. This recital indicates the ample opportunity afforded him to know the grounds on which the denial of his application was based—with the exception of information undisclosed because to do so might prejudice foreign relations (*supra,* pp. 55–57, and *infra,* pp. 75–77)—and to attempt to explain or refute the facts underlying those grounds. Some of the salient conclusions compelled by that review are as follows:

It is clear that petitioner was fully aware of the general nature of the derogatory information upon which the tentative denial by the Passport Office was based, well in advance of the hearings before the

Board of Passport Appeals. Thus, in his affidavit of June 14, 1954, petitioner stated his understanding that the tentative denial was based upon his associations with the Science for Victory Committee, Alfred Sarant, and Bernard Peters (R. 11). The affidavit recognized and dealt with in detail the very incidents and associations in petitioner's past upon which the Secretary's factual findings were ultimately based (R. 10–42). That petitioner was correct in his view of what aspects of his past were considered pertinent was confirmed by the Department's letter of December 1, 1954 (R. 48, 49). This letter set forth further particulars with respect to the apartment incident and named nine individuals, including Peters, Sarant, the Collinses and Rose Segure, with whom petitioner was allegedly associated and concerning whom the Department's file contained derogatory information (R. 49). A comparison of this letter with the findings of the Secretary (*supra*, pp. 19–22) reveals the essential identity of the "charges" and the findings (R. 276–277). Moreover, petitioner's testimony throughout the first hearing again demonstrated his grasp not only of the nature but of many of the details of the security information available to the Department. Cf. *National Labor Relations Board* v. *Mackay Co.*, 304 U. S. 333; *Moog Industries* v. *Federal Trade Comm'n*, 238 F. 2d 43 (C. A. 8); *Bailey* v. *Richardson*, 182 F. 2d 46, 58 (C. A. D. C.), affirmed by an equally divided court, 341 U. S. 918.

Petitioner was thus aware, at an early stage in the proceedings, of virtually all of the information available to the Department of State and relating to peti-

tioner's past which he could best hope to refute, *i. e.*, his own past activities and associations with named individuals and a specified organization—as contrasted with the sources and details of information relating to the nature or character of the persons and organizations with whom petitioner had associated. With but two exceptions, petitioner made no attempt to deny his alleged activities and associations, but instead testified at length to the insignificance of some and to his lack of knowledge of any connection between these activities and associations and the Communist movement or espionage—thus demonstrating his understanding of the nature of the derogatory information as to these activities and associations. With respect to the two exceptions—petitioner's denial that he had ever been at 65 Morton Street and that he had any recollection of having met William Perl—the Department procured the voluntary appearance of three disinterested witnesses whose testimony was in direct contradiction to that of petitioner. All three testified that they had seen petitioner at 65 Morton Street, and two of the witnesses testified that they had seen petitioner and Perl in each other's company.[33] This testimony was given in the presence of petitioner and his attorney, and was subjected to vigorous cross-examination. Petitioner had full opportunity to call any witnesses he desired.

The Secretary thus received for review and decision, in addition to the classified information in the departmental file, a public record which showed that

[33] The Secretary made no finding, however, based upon petitioner's alleged relationship with Perl.

petitioner had received fair notice of the general information against him (the sources and details of which were withheld for security reasons), and an opportunity to counter that information to the best of his ability; that he admitted most of the primary facts of association and activity; and that as to those he denied he had been confronted with and contradicted by disinterested witnesses. In short, petitioner's presentation of his own case was not unduly hampered by the use of undisclosed information; rather, he was in a good position to disprove the allegations which related to himself; and he was made aware of the general nature of the charges against the others with whom he was linked.

B. THE WITHHOLDING OF THE SOURCES AND DETAILS OF CERTAIN INFORMATION WAS JUSTIFIED BY THE CONSIDERATIONS RECITED BY THE SECRETARY AND DID NOT VIOLATE DUE PROCESS

The court below has ruled that, on the basis of the reasons advanced by the Secretary of State for the nondisclosure of confidential information relating to the denial of petitioner's application, the Secretary "need not disclose the information but he may act upon it" (R. 295).[34] Petitioner challenges this ruling and the validity of the regulations permitting the limited withholding of information where security considerations require (Pet. Br. 21–43; see also the

[34] In the *Briehl* case, No. 481, the four judges who reached this issue, including the two judges in the majority below, ruled that the Secretary could validly take into account confidential information in passing upon passport applications (see R. 195–198).

Brief for *Amici*, pp. 10–32).[35] We submit that, on the contrary, the holding of both courts below on this issue must be sustained.

1. *The nature of the conflicting interests.*—The conflicting interests which must be considered in determing the requirements of procedural due process in

[35] The important provisions under attack in this connection are Sections 51.137, 51.162, 51.163 and 51.170 (App. *infra*, pp. 110, 115–117). These sections contain the following provisions (emphasis added):—Section 51.137 provides that an applicant whose application is tentatively denied shall be notified "of the reasons on which [the denial] is based, as specifically as in the judgment of the Department of State *security considerations* permit," with a similar provision in the event of a final denial by the Passport Office. Section 51.162 permits an applicant petitioning to the Board of Passport Appeals to "address a request in writing to the Board for such additional information or explanation as may be necessary to the preparation of his case", which request is to be passed on by the Board "[i]n conformity with the relevant laws and regulations", the Board taking "whatever action it deems necessary to insure the applicant of a full and fair consideration of his case". Section 51.163 provides that "[t]he Passport file and any other pertinent Government files shall be considered as part of the evidence in each case without testimony or other formality as to admissibility", but such files, other than papers submitted by the applicant, may not be examined by the applicant. That section further provides that the hearing before the Board is to be conducted "in such manner as to protect from disclosure *information affecting the national security or tending to disclose or compromise investigative sources or methods*". Section 51.170 provides that "[i]n determining whether there is a preponderance of evidence supporting the denial of a passport the Board shall consider the entire record, including the transcript of the hearing and *such confidential information as it may have in its possession. The Board shall take into consideration the inability of the applicant to meet information of which he has not been advised, specifically or in detail, or to attack the credibility of confidential informants*". (Emphasis added.)

this case lie on several levels. For the reasons given in our brief in No. 481, we believe that the first level of conflict must be resolved in favor of the Government—that the interest of the individual citizen in unrestricted freedom of travel must yield to the needs of the body politic in times of war or emergency, and that the Government may maintain a system of travel control, so long as that system embodies the essentials of due process of law.

The second level of conflict concerns the application of the travel control system once it has been established; and here the opposition is again between the individual, on the one hand, and the Government, as representative of the Nation, on the other—the individual has an interest in being informed of the source, content, and details of all information upon which the Government proposes to base a restriction of his travel, in order that he may explain or refute such information; the Government, at the same time, has an interest in protecting from disclosure information which cannot be revealed without adversely affecting the national security and the conduct of foreign relations. With regard to the conflict at this level, "no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense". *Roviaro* v. *United States*, 353 U. S. 53, 62.

Petitioner contends that, in this balancing, his own interest in and right to full disclosure in the face of a

threatened passport denial are absolute.[36] If the conflict must be resolved at this level, petitioner asserts that the interest of the Nation must give way to his own interest, and full disclosure is required, despite the serious consequences which the Secretary states would flow from such disclosure (Pet. Br. 23–33).

Recognizing, however, that the Secretary's statement of reasons for non-disclosure may not lightly be brushed aside, petitioner suggests that this head-on clash of individual and national interests need not be resolved at all. The suggested solution is implied in the statement that "No one suggests that the Secretary be forced to open any of his files" (Pet. Br. 34); the feared detriment of disclosure may be avoided by the simple expedient of issuing petitioner a passport; the Secretary's information will be protected, and petitioner will cease to have cause for complaint. The effect of this "solution" is, of course, to create a new conflict, compelling the Secretary to resolve the clash of two national interests to the inevitable destruction of one of them; petitioner would force the Secretary to choose between preservation of the Government's intelligence system and certain aspects of its foreign relations, on the one hand, and the maintenance of the travel control system, enjoined by Congress, on the other.

We submit that resolving the problem in this way is no solution at all; one or another of the Government's major interests would necessarily have to be

[36] We have indicated, *supra*, pp. 37–41, 44–45, that a travel control system which must operate on the evidentiary and procedural standards of a criminal trial is illusory and serves no valid purpose.

sacrificed, and no interest of the individual would be affected in any way. Petitioner's solution, in short, is once again to maintain the absolute supremacy of the applicant's right to full disclosure of all the information used against him, no matter what the consequences. This absolute conclusion is the one to which this country normally adheres in criminal trials because of the nature of the proceeding and of the sanction, but it has not been applied in other areas, where the interests in non-disclosure are strong and outweigh the individual's interest in full disclosure. An appropriate accommodation is essential.

The nature of this conflict, and the necessary result of petitioner's position, were well expressed in *Liversidge* v. *Anderson* [1942] A. C. 206, 253–254. In that case, the House of Lords flatly rejected petitioner's view that the interest of the individual in full disclosure is so inviolate that, in deference to it, a cabinet officer may be compelled in time of crisis to act in derogation of a vital national interest. That was a suit for damages for false imprisonment based upon the detention of the plaintiff under a World War II administrative regulation.[37] The plaintiff's arguments

[37] The regulation provided that "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defense of the realm * * * and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained". The House of Lords held in *Liversidge* that the Secretary need not reveal the grounds for his "reasonable cause to believe". See also *Greene* v. *Home Secretary* [1942] A. C. 284; *Rex* v. *Home Secretary* (*Ex parte Budd*) [1942] 2 K. B. 14.

against the use of confidential information would have required the Secretary to choose between release of the plaintiff and disclosure of the information. Lord Macmillan said:

> As Lord Parker said in *The Zamora:* "Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public." * * *
>
> As I have indicated, a court of law manifestly could not pronounce on the reasonableness of the Secretary of State's cause of belief [on which detention was based] unless it were able to place itself in the position of the Secretary of State and were put in possession of all the knowledge both of facts and of policy which he had. But the public interest must, by the nature of things, frequently preclude the Secretary of State from disclosing to a court or to anyone else the facts and reasons which have actuated him. What is to happen then? The appellant says that the court is entitled and has a duty to examine the grounds of the Secretary of State's belief. But the court is also bound to accept a statement by the Secretary of State that he cannot consistently with the public interest divulge these grounds. Here is indeed an impasse. The appellant's solution has the merit of courage, not to say audacity. He says that where the Secretary of State, by declining to disclose his information, has failed, through no fault of his own to justify the detention, he must be held confessed of having

> falsely imprisoned the detained person and must be mulcted in damages. It will naturally be in the most dangerous cases, where detention is most essential to the public safety, that the information before the Secretary of State is most likely to be of a confidential character, precluding its disclosure. Yet the court is to be constrained where detention is most justifiable to find the detention unjustified. I decline to accept an interpretation of the regulation which leads to so fantastic a result.

It is worthy of note that, in the present case, the choice offered by petitioner would require, as the price of withholding security information, not merely that petitioner be released from all travel restriction. It would require, in addition, that the Secretary of State affirmatively confer his official sanction, in the form of a passport, upon the travel of one who, he has reason to believe, is going abroad to further the aims of those who seek to undermine our national integrity.

2. *The Secretary has stated adequate reasons for withholding information relating to foreign relations, and the sources and details of information relating to internal security.*—In assessing the conflict between national and individual interests, we consider first the validity of the reasons stated by the Secretary for withholding the substance, sources, and details of information in this case. At the outset, we note the important fact that the information has been reviewed by the Secretary of State himself, and that it is he who has attested to the reasons for nondis-

closure.[38] Thus "the protection implicit in the office of the functionary whose conduct is challenged" (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 163, Mr. Justice Frankfurter, concurring) lends weight both to the presumption that disclosure would in fact lead to grave detriment, and likewise to the presumption that petitioner's conflicting interests have been carefully considered in restricting his right to travel on the basis of undisclosed information.[39]

(*a*). *Foreign relations information*:—Turning first to the withholding of "confidential information contained in the files of the Department of State, the disclosure of which might prejudice the conduct of United States foreign relations" (R. 278, paragraph V, *supra*, p. 22), there can be no doubt of the Secretary's prerogative to withhold such information from petitioner, the public, and the courts, on the ground that "to disclose publicly" such information

[38] In *Jay* v. *Boyd*, 351 U. S. 345, 358, note 22, the Court noted that a special inquiry officer (not the Attorney General) had "found that the disclosure of the information would have been contrary to public interest, safety or security. We accept that finding. Nothing more is required by the regulation".

[39] The Association of the Bar of the City of New York recommends that the need for non-disclosure in security matters be certified by the head of an agency. *The Federal Loyalty-Security Program* (1956), 174. The Commission on Government Security similarly recommends that in certain loyalty proceedings no confrontation of regular informants be required if the "head of the investigative agency determines that the disclosure of the identity of such informants will prejudice the national security". See *Report* at, *e. g.*, 66–67, 141, 225. See also Mankiewicz, Mangum and Moody, *The Federal Loyalty-Security Program: A Proposed Statute*, 44 Calif. L. Rev. 72, 84.

"might * * * prejudice the interest of United States foreign relations" (R. 278, paragraph VI, *supra*, p. 23). Moreover, as we shall show, the Secretary may act upon such information without disclosing it (*infra*, pp. 86-102).

Petitioner himself, while pointing out that the Secretary has not indicated the substance of this information[40] (Pet. Br. 22), makes no serious objection to the adequacy of the Secretary's statement as furnishing grounds for refusing to disclose the information. *Amici*, however, assert that since the Secretary fails to state "[*h*]*ow* the disclosure * * * might prejudice our foreign relations" and therefore "requires too much conjecture", his statement must be given little or no weight (Brief for *Amici*, p. 17; emphasis in the original). This is indeed an extraordinary statement with respect to the "very delicate" nature of foreign relations,[41] of which the Secretary of State is of course the judge. Obviously, in countless instances, the revelation of *how* a disclosure might prejudice international relations (or indeed any other interest) would frequently be tantamount to a disclosure of the information itself, or of some other vital matter, and could lead to

[40] The implication by *amici* (Brief for *Amici*, p. 3, note 1) that the Government misled the court below into a belief that the substance of this particular information had been disclosed to petitioner is unwarranted. In the Brief for Appellee (the Secretary) below, it was expressly stated that "the Secretary's decision includes * * * a summary of all the confidential information relied on, *other than that relating to the conduct of foreign affairs*" (Brief in C. A. D. C., No. 13717, p. 39, note 32; emphasis added).

[41] *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320.

the same detrimental results. This Court said in *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 321:

> The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution *directs* the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is *requested* to furnish the information "if not incompatible with the public interest". A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.

Even in a case in which prejudice to foreign relations was not the stated basis for non-disclosure of information, the Court has ruled that, where the use of confidential information is permissible, "the requirement of a decision containing 'reasons' is fully complied with by a statement to the effect that the application has been denied on the basis of confidential information, the disclosure of which would be prejudicial to the public interest, safety or security". *Jay* v. *Boyd*, 351 U. S. 345, 360. Here, the Secretary's statement of his reasons more than meets this test.

(*b*). *Internal security information.*—The same is true of the Secretary's statement of reasons for non-disclosure of the source and details of the information set forth in paragraphs Ib–IVb of the findings, *supra*,

pp. 19–22 (R. 276–277). As to this information, the Secretary has said (Paragraph VI, R. 278):

> The confidential information referred to in paragraphs I (b), II (b), III (b) and IV (b) above relates to the internal security of the United States. The substance of this confidential information was disclosed to the applicant during the consideration of his passport application. To disclose publicly the sources and details of this information would, in my judgment, be detrimental to our national interest by compromising investigative sources and methods and seriously interfering with the ability of this Department and the Executive Branch to obtain reliable information affecting our internal security. Moreover, it would have an adverse effect upon our ability to obtain and utilize information from sources abroad and interfere with our established relationships in the security and intelligence area * * *.

This is surely a most comprehensive statement of reasons for non-disclosure.[42] Cf. *United States* v. *Reynolds*, 345 U. S. 1, 4–5. The considerations recited, from the Secretary of State himself, would seem to be weighty indeed. This Court has only recently said (*Jencks* v. *United States*, 353 U. S. 657, 670):

> It is unquestionably true that the protection of vital national interests may militate against public disclosure of documents in the Govern-

[42] Compare *Jay* v. *Boyd*, *supra*, where the Court said of the far more general reason of prejudice "to the public interest, safety, or security": "If the statue permits any withholding of information from the alien, manifestly this is a reasonable class of cases in which to exercise that power." 351 U. S. at 358.

ment's possession. This has been recognized in decisions of this Court in civil causes * * *.

In the *Reynolds* case, *supra*, the Court (at p. 7) cited *Duncan* v. *Cammell, Laird & Co.*, [1942] A. C. 624, as reviewing "[m]ost of the English precedents" in this field. That case—significantly, a civil action in the ordinary courts—arose out of the sinking of the submarine *Thetis*. Discovery was sought of the plans and construction contracts of the submarine. The House of Lords held that discovery could not be obtained. "The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld". [1942] A. C. at 636. And the sole arbiter of when the public interest so requires is the cabinet minister who heads the department to which the documents belong. Although the action was between private parties, the Law Lords held that no distinction was to be made for suits against the Government, and in fact stated that when the Crown is a party it may not be required to give discovery at all. [1942] A. C. at 632.[43]

The House looked carefully into the question whether the departmental determination should be conclusive. The judgment of the Lord Chancellor

[43] "The importance of *Duncan* v. *Cammell, Laird & Co.* * * * is marked by the fact that seven members of the House of Lords sat to hear the appeal. Moreover, the unusual course was followed of delivering only a single judgment which was prepared by the Lord Chancellor after 'consultation with and contribution from' the other learned Lords". 58 L. Q. Rev. 436. The decision disapproves the decision of the Judicial Committee of the Privy Council in *Robinson* v. *State of South Australia*, [1931] A. C. 704.

(Viscount Simon), speaking for all the Law Lords, said ([1942] A. C. 624, 638):

> The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents, *e. g.*, departmental minutes, to which they belong.

And, after reviewing the cases, and quoting among others the statement of Lord Kinnear in *Admiralty Commissioners* v. *Aberdeen Steam Trawling & Fishing Co.*, [1909] Sess. Cas. 335—"A department of Government to which the exigencies of the public service are known as they connot be known to the Court, must, in my judgment, determine a question of this kind for itself * * *"—the Lord Chancellor declares that the executive determination of privilege is conclusive on the court.

The Lord Chancellor then goes on to lay down standards on which the minister should base his executive determination, mentioning, among others, situations where "disclosure would be injurious to national defence * * * or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service." [1942] A. C. at 642. These are the factors on which the Secretary made his determination in this case. See R. 278, *supra*, pp. 22–23. The Lord's final conclusion was that:

> When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration. * * * After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation.

Petitioner nevertheless says that "the prejudice which the Government claims will flow from disclosure is, to say the least, fanciful" (Pet. Br. 35); *amici* similarly launch a full-scale attempt to demonstrate that no damage to the national interest would in fact be caused by "compromising investigative sources and methods", by "seriously interfering with the ability of [the State] Department and the Executive Branch to obtain reliable information affecting our internal security", by adversely affecting "our ability to obtain and utilize information from sources abroad", and by interfering "with our established relationships in the security and intelligence area". To the contrary, petitioner suggests that nothing but beneficial results would flow from these effects of disclosure (Pet. Br. 35)."

"The entire argument of *amici* on this issue (Brief for *Amici*, pp. 16-24) is irrelevant, since it is based *in toto* upon the erroneous premise that "nowhere does the Secretary state that the particular confidential information undisclosed to petitioner in the present case 'affects the national security'" (*id.* at

The prejudice from disclosure envisaged by the Secretary is not "fanciful", nor are the vital national interests involved in maintaining investigative sources and methods, as well as security and intelligence relationships, to be dismissed as trivial. It goes without saying that this Government could not long survive in its present constitutional form if it did not keep itself constantly supplied with information which "relates to the internal security of the United States". The question here is whether the necessary means of obtaining this information would be so dangerously impaired by the disclosure of sources and details of the information obtained through such means that the information itself would no longer be forthcoming. We submit that such would be the case, and that as a result the Court must defer to the reasons for non-disclosure cited by the Secretary of State.

This question has been most frequently debated in the context of the Government's employee security and loyalty programs, in which reports of the Federal Bureau of Investigation have been the primary sources of confidential information. We may assume that the bulk of the security information relied upon by the Secretary was likewise from FBI reports. A chairman of the former Loyalty Review Board has explained the need for non-disclosure as follows (Rich-

22), and that as a result "[w]e are left * * * with the protection of sources and investigative methods [impliedly unrelated to national security] as the sole understandable reason assigned" for non-disclosure (*id.* at 17). But paragraph VI of the Decision and Findings begins with this sentence (R. 278; emphasis added): "*The confidential information referred to * * * relates to the internal security of the United States.*" *Supra*, p. 23.

ardson, *The Federal Employee Loyalty Program*, 51 Col. L. Rev. 546, 549–550):

> * * * the role of the FBI report must be appreciated. In the overwhelming majority of cases, the record, without the FBI report, would not contain important material information with respect to derogatory items concerning the particular employee. The long and varied experience of the FBI is to the effect that its investigative reports should include statements from confidential sources. Of necessity, these sources are of varied natures. The FBI has many agents operating secretly for the purpose of ferreting out facts to aid the President. The disclosure of their identity, of circumstances indicative of identity, would not only completely destroy their usefulness but in many cases subject them to serious physical danger. Other confidential informants are members of the public who will give information to the FBI only under a strict seal of confidence, their reasons being the obvious ones of the ordinary citizen who refuses to get involved in a public controversy. A further source might be fellow employees or business associates who, unless given complete anonymity, would not under any circumstances disclose their knowledge to the FBI. Numerous comparable informants might be referred to, and in the overwhelming majority of cases, the material facts with reference to derogatory items come from such confidential sources.
>
> As a result, the FBI rigorously observes its promises of confidence and will not disclose to anyone these evidential sources. * * * It is not an answer to suggest that the confidential re-

> ports made by the FBI should be used only as a lead to actual first-hand evidence. The very nature of such confidential information implies that, since the persons would speak to the FBI only in confidence, personal testimony could not be secured even if the Board had the power to require it.

See also Hoover, *A Comment On the Article "Loyalty Among Government Employees,"* 58 Yale L. J. 401, 409–410; *Hearings Before the Subcommittee of the House Appropriations Committee on Department of Justice Appropriation Bill for 1949,* 80th Cong., 2d Sess., pp. 245–247.

In the particular context of this particular case, these reasons are especially compelling. The information as to the Science for Victory Committee, Bernard Peters, Alfred Sarant, and the apartment at 65 Morton Street does not relate to matters of relatively minor significance in the hierarchy of internal security considerations; it relates to possible espionage on behalf of an adverse foreign power.

It is well to note, in addition, that confidential informants supply information, obtainable in no other way, which may result in a decision favorable instead of adverse to a passport applicant. Mr. Richardson referred to "members of the public who will give information to the FBI only under a strict seal of confidence" (*supra,* p. 83). Such a person—a friend, neighbor, or co-worker—though at times the source of

derogatory information, often is able to furnish information tending to dispel adverse inferences furnished by sources less well acquainted with the subject. Whether his information be favorable or adverse, however, it is seldom available at all except under an assurance of strictest confidence. If such assurance is breached by disclosure, or if no such assurance may safely be given, this whole source of information necessarily evaporates. Nor is it any answer to say that if the information is of sufficient importance a patriotic citizen would be willing to have its source disclosed and to testify to it, since the individual informant, having only a fragmentary view of an over-all situation, might be totally unaware of the value of the information which he declines to discuss.

We are, of course, not unmindful that the legitimate governmental interests to which we have referred have at times been held up as a shield to justify abusive and oppressive exercises of power, not only abroad but in this country as well. But such abuses of lawful powers do not destroy the powers themselves. The procedures here established and applied by the Secretary of State, in carrying out a program required by Congress, show no such abuse. The words of Mr. Justice Frankfurter, concurring in the recent case of *In re Groban*, 352 U. S. 330, 335–336, are pertinent:

> To whatever extent history may confirm Lord Acton's dictum that power tends to corrupt,

> such a doctrine of fear can hardly serve as a test, under the Due Process Clause * * *, of a particular exercise of * * * legislative power. And so, the constitutionality of a particular statute, expressive of a State's view of a desirable policy for dealing with one of the rudimentary concerns of society * * * and directed toward a particular situation, cannot be determined by deriving a troupe of hobgoblins from the assumption that such a particularized exercise of power would justify an unlimited, abusive exercise of power.

3. *Petitioner's interests do not constitutionally require that the Secretary of State ignore the undisclosed information in passing upon petitioner's passport application.*—From what we have said, we think it plain that the national interest in non-disclosure of information pertaining to foreign relations and internal security is a vital one, particularly in times such as these. Moreover, we believe that Congress may, in such times, authorize the use of such information in the operation of a travel control program, as it has here.

(a) As already indicated (*supra*, pp. 54–55, note 28), petitioner's claim to an inviolate constitutional right to full disclosure is essentially an assertion of an absolute right conferred in terms only upon defendants in criminal actions under the Sixth Amendment: the right to confrontation of *all* witnesses against him. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 174, 180, concurring opinion of Mr. Justice Douglas; cf. *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 337–338; *Hepner* v. *United States*, 213

U. S. 103; *United States* v. *Zucker*, 161 U. S. 475.[45] As the court below has pointed out (R. 296–300; see also No. 481, R. 195–198), in non-criminal proceedings this Court has permitted the Government to act upon the basis of undisclosed information, where the reasons for nondisclosure are sufficiently weighty.

The most striking parallel is the decision in *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103. That case involved the right to do business abroad—the right to operate an air route into foreign countries. The company had a "right" to engage in such business, as an aspect of "liberty" protected by the Fifth Amendment. The exercise of such a right, like the exercise of the right to travel abroad, is of course subject both to the permission of the foreign government involved and to reasonable regulation by the United States Government, within the framework of due process of law. In the *Chicago & Southern*

[45] Petitioner argues that the requirements of due process are especially great here because the Secretary has "branded" petitioner and affixed a "badge of infamy", citing *Peters* v. *Hobby*, 349 U. S. 331, 347; *Wieman* v. *Updegraff*, 344 U. S. 183, 191, and *Cole* v. *Young*, 351 U. S. 536, 546, all cases involving dismissals from government employment. The phrase "badge of infamy" originated in the *Wieman* case, where the Court said of such dismissal that "*In the view of the community*, the stain is a deep one; indeed, it has become a badge of infamy" (344 U. S. at 190, 191; emphasis added). The "badge" is thus something which has practical adverse effects due to community reaction. Here, however, petitioner appears to have applied for a passport largely in order to escape the effects, particularly in terms of employability in his chosen profession, of a "badge" he already wore. See R. 37, 39, 41. We may therefore assume that, even if the Secretary's determination became known, it would not substantially add to petitioner's existing burdens. See note 53, *infra*, p. 98.

case, the Civil Aeronautics Board, with the approval of the President, had granted a certificate of convenience and necessity for an air route to Chicago and Southern Air Lines and had denied one to Waterman Steamship Corporation. Waterman was thus barred from exercising its right, not on the basis of a determination that no air line should operate in the area involved, but on the basis of an individualized determination that Chicago and Southern should be permitted to do so and that Waterman should not.[46] The recommended order of the Civil Aeronautics Board, which had not been made public, had been changed by the President, without revealing the nature of the specific reasons for the change. The President thereafter approved a revised order, which was made public as a final order. The Court did not hold that such a procedure deprived Waterman of its right to engage in business abroad without due process; to the contrary, the Court held that it could not even review the final order. The Court said (*id.* at 111):

> While the changes made at the direction of the President may be identified, the reasons therefor are not disclosed beyond the statement that "because of certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility, he has reached conclusions which require" changes in the Board's opinion.

[46] This Court has said that the *Chicago & Southern* case did "not involve individualized fact finding and classification, but * * * political judgments * * *". *Gonzales* v. *United States*, 348 U. S. 407, 412, note 4. But if that be so, the Secretary's decision here, based in part upon information pertaining to foreign relations, is equally a "political judgment".

> The court below considered, and we think quite rightly, that it could not review such provisions of the order as resulted from Presidential direction. The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. *Coleman* v. *Miller*, 307 U. S. 433, 454; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–321; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302.

In the *Curtiss-Wright* case, the Court sustained a criminal indictment charging violation of a Joint Resolution implemented by Presidential proclamation placing an embargo upon the sale of munitions—again, a "right" subject to reasonable regulation—to

persons in certain countries whenever the President proclaimed that such embargo might contribute to the reestablishment of peace. Concerning the President's right to use confidential information in reaching his conclusions, the Court said (299 U. S. at 320–321):

> * * * [The President], not Congress has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. * * *
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> * * * * *
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> When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. * * *

Decisions permitting the withholding of sources and details of information to the possible detriment of individuals are not limited to matters arising in connection with control of foreign affairs. In the judicial area, a suit against the Government may not be maintained if it would necessarily lead to the disclosure of a state secret. *Totten* v. *United States,* 92 U. S. 105. In tort actions against the Government, the plaintiff is not entitled to discovery of pertinent Government documents if, "from all the circumstances of the case, * * * there is reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged". *United States* v. *Reynolds,* 345 U. S. 1, 10. Non-disclosure in such a case does not result in judgment for the plaintiff (as the Court of Appeals had held in *Reynolds*), and the Government may continue to litigate.[47] A judge may impose the death sentence upon a duly convicted offender, despite the jury's recommendation of life imprisonment, upon

[47] The *Reynolds* decision demonstrates that the reliance of petitioner (Pet. Br. 30, 47) and *amici* (Brief for *Amici*, pp. 26-27) upon *Jencks* v. *United States*, 353 U. S. 657, and *Communist Party of the United States* v. *Subversive Activities Control Board* (C. A. D. C., No. 11850, decided January 9, 1958), is misplaced. In *Jencks*, the Court said (353 U. S. at 670-671):

> * * * [T]his Court has noticed, in *United States* v. *Reynolds*, 345 U. S. 1, the holdings * * * that, in criminal causes "* * * the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its gov-

the basis of information as to the offender's past record given by witnesses with whom the accused has not been confronted and as to whom he has had no opportunity for cross-examination or rebuttal. *Williams* v. *New York,* 337 U. S. 241. Nor is a quasi-judicial hearing required in deciding whether probation once granted should be revoked. *Escoe* v. *Zerbst,* 295 U. S. 490.

Certain cases reviewing administrative actions adverse to individuals based in part upon evidence or sources and details of evidence undisclosed to such individuals have been to the same effect. It is a truism that, even in the absence of an emergency, the standards of notice and hearing equired by due process in administrative proceedings are not necessarily those of a judicial, much less a criminal, proceeding. *Anderson National Bank* v. *Luckett,* 321 U. S. 233; *L. B. Wilson, Inc.* v. *F. C. C.,* 170 F. 2d 793 (C. A. D. C.). In such proceedings, "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights". *National Labor Relations Board* v. *Mackay,* 304 U. S. 333, 351. "While confrontation may generally be accorded, such is not always the case." This is particularly evident in cases involving, as here,

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ernmental privileges to deprive the accused of anything which might be material to his defense * * *" 345 U. S., at 12.

In the *Reynolds case*, the next sentence was this (345 U. S. at 12; emphasis added):

> *Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented.*

[46] See, generally, Davis, *Administrative Law* (1951), chap. 7.

exercises of the war power and of aspects of the foreign relations power. Thus, a citizen eligible for the draft may lawfully be imprisoned for failure to comply with an adverse *individualized* administrative determination which is based in part upon unrevealed information from undisclosed sources, so long as the individual concerned is furnished a "fair résumé" of unfavorable evidence. *United States* v. *Nugent*, 346 U. S. 1, 6.[9] And aliens, who have met every congressionally-established qualification for admission to this country, may be validly denied entry, under 8 U. S. C. 1185, on the basis of "information of a confidential nature, the disclosure of which would

[9] In *Nugent*, the Court did not even qualify its holding by stating that non-disclosure must be based upon the interests of national security. In an article much relied upon by petitioner (Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193 (1956)), Professor Davis criticizes this omission, stating that the court should have held that the individual "is entitled to know all the facts in the file *except to the extent that such an interest as national security clearly requires that particular evidence or its source should not be disclosed*". *Id.* at 248; emphasis added.

Petitioner ignores the *Nugent* case, but relies upon the Davis article and upon another conscientious objector case, *Gonzales* v. *United States*, 348 U. S. 407, to show that the requirements of "individualized" fact finding and "legislative" fact finding differ (Pet. Br. 24–25, 27). But he ignores the fact that *Nugent*, being a selective service case like *Gonzales*, was by definition a case of "individualized" fact finding. *Amici*, on the other hand, attempt to distinguish the conscientious objector cases on the ground that they were "expressly justified, only as an 'exercise of the war power' by means of a statute 'calculated to function in times of peril'" (Brief for *Amici*, pp. 30–31). We believe that this statement expresses the justification for the use of confidential information in passport denials affected by 8 U. S. C. 1185 (see *supra*, p. 35).

be prejudicial to the public interest", and with no hearing whatsoever. The Court so held in the case of an alien wife of an American citizen, *United States ex rel. Knauff* v. *Shaughnessy,* 338 U. S. 537, as well as in the case of a former resident alien, *Shaughnessy* v. *United States ex rel. Mezei,* 345 U. S. 206. A long-resident but deportable alien, found to have met the congressionally-established requirements for eligibility for suspension of deportation, may be refused suspension by an inquiry officer on the basis of confidential information, the disclosure of which would be prejudicial to the public interest, safety or security. *Jay* v. *Boyd,* 351 U. S. 345.[50]

(*b*). We have attempted to show (*supra,* pp. 35–45) that the particular circumstances of passport issuance at the present time call for procedural standards different from those applicable in other areas, just as the special circumstances of the cases just cited (*supra,* pp. 87–94) called for departures from what is generally considered the procedural norm. Our view has been recognized by students of these problems. Two academic authorities in the field of administrative law, Professors Kenneth Davis and Louis Jaffe, have explicitly given such recognition. Professor Davis, a severe critic of the general use of undisclosed information by Government officials in administrative pro-

[50] "And the situation is not different because the matter of suspension of deportation is taken up in [what] the [regulations require to be a] 'fair and impartial' deportation 'hearing'. Assuming that such a 'hearing' normally precludes the use of undisclosed information, the 'hearing' here involved necessarily contemplates the use of confidential matter in some circumstances." 351 U. S. at 360.

ceedings, has written that in the particular field of passport issuance "the right of the individual to know the evidence against him may in some circumstances have to yield to some extent to the interest in national security." Davis, *op. cit. supra,* 70 Harv. L. Rev. 193, 262. Professor Jaffe states (Jaffe, *The Right to Travel: The Passport Problem,* 35 Foreign Affairs 17, 27, 28):

> * * * The evil of the secret dossier would * * * be somewhat mitigated if denials were limited to cases in which the Administration was prepared to make a specific finding of the Communist element. But should we condemn the secret dossier absolutely and without exception? Shall we deny the urgency of the Government's argument that if it must reveal its sources of information, its sources may dry up? Does it follow that if we recognize the country's interest in self-defense, we must recognize the secret dossier as a condition of effective action? * * * [The] appeal to our "tradition of fair play" is inconclusive; there have been and continue to be a number of consequences visited upon individuals short of imprisonment for crime which rest upon unrevealed evidence, *e. g.,* exclusion of aliens. The use of secret evidence then is not unknown to us. Yet we may feel that it is wrong, and that the risks we should run from abandoning the practice do not exceed those of the criminal law. Nevertheless, I do not feel a sufficient assurance on the point to urge upon the reader the absolute rejection of the secret dossier.
>
> But it is at this point of demonstrable Communist involvement that I would draw the line.

> We may keep Communist "conspirators" at home because we have determined that the dangers are great and imminent. There may, of course, be other cases of a similar danger: the disclosure of top secrets suggests itself. But no lesser danger should suffice. * * *

The Commission on Government Security has recommended generally that in the operation of governmental security programs confrontation of informants "should be allowed to the maximum extent consistent with the protection of the national security * * *", requiring that no information be considered which has been furnished by persons other than "regularly established confidential informants" unless confrontation is permitted; information supplied by regular informants may be considered if the substance of the information is disclosed and the head of the investigative agency determines that disclosure of identity would prejudice the national interest. See *Report* at, *e. g.*, 66–68. But the Commission excepts the passport program from this general recommendation (*id.* at 494–495):

> The Commission recognizes that its general recommendation with respect to confrontation found elsewhere in this report must be held to be not applicable to the passport security program.
>
> It will be acknowledged that the Secretary of State, in making his decision to refuse or revoke a passport for security reasons, must weigh factors not to be found in other security programs.
>
> Our recommendation for confrontation to the fullest extent possible consistent with the pro-

tection of national security, takes into account the fact that disclosure of the sources and details of confidential information related to the internal security would be detrimental to the national interest by compromising investigative sources and methods.

But these factors, when applied to decisions of the Secretary of State in passport matters, have even broader implications because disclosure of confidential information in the files of the Department of State could very well prejudice the conduct of United States foreign relations.

Security measures and foreign affairs, therefore, are so inextricably interwoven that greater application of the principle of confrontation conceivably could bring serious harm to the national interest.

As long as the substance of confidential information is disclosed to a passport applicant during the processing of the application and subsequent hearing, thus affording him opportunity to rebut, there will not be a serious departure from the degree of confrontation recommended by the Commission.

(*c*). Congress clearly did not intend that the operation of the travel control system be subject to the procedural protections of a criminal trial (*supra*, pp. 36–43), and petitioner can point to no Supreme Court or appellate decisions which say that the Due Process Clause requires such protections. With the exception of *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9), none of the cases cited by petitioner or *amici*, for the proposition that administrative action may not be predicated upon undisclosed information, involved

a statute or regulations whose operation was predicated on the war power; and in many of the cited cases in which information was withheld, the reasons for doing so were not based upon the interests of national security. *Parker* v. *Lester, supra,* aside from the fact that it is in no way controlling in this Court, is readily distinguishable and not in any true conflict with the present case. The court below, after citing *Parker,* found it necessary only to indicate that, in exercising the passport power, the Secretary of State takes foreign policy considerations into account (see Prettyman, J., in No. 481, R. 195)—unlike the Commandant of the Coast Guard in conducting the port security program. There are numerous other distinctions. In view of the heavy reliance upon that case by both petitioner (Pet. Br. 12, 28–29, 35) and *amici* (Brief for *Amici,* pp. 9, 17–24),[51] it is well to note these distinctions in order to demonstrate that, even if *Parker* v. *Lester*[52] was correctly decided, it would not be dispositive of the issues presented here.

To begin with, there is a plain difference between the *ex parte* cancellation of a certificate without which a seaman may not lawfully obtain employment in his chosen field,[53] and the issuance of a document, tradi-

[51] See *supra,* note 44, p. 81.

[52] We shall refer to the following opinions in that case: 98 F. Supp. 300 (N. D. Cal.); 112 F. Supp. 433 (N. D. Cal.), reversed and remanded, 227 F. 2d 708 (C. A. 9); *Lester* v. *Parker,* 235 F. 2d 787 (C. A. 9), rehearing denied, 237 F. 2d 698.

[53] It is argued that the denial of petitioner's passport has deprived him of his right to work as well as of his right to travel (see Pet. Br. 70; Brief for *Amici,* p. 13). This is in effect an attempt to burden the Secretary with responsibility for the very circumstances which caused petitioner to seek a

tionally issued by the Secretary of State in the discretionary exercise of his foreign affairs power, without which citizens today may not depart from the United States for travel to certain countries. There is also a marked contrast between the procedures accorded the plaintiffs in *Parker* and those accorded petitioner here.

The events in *Parker* began, not with applications for clearance certificates in order that the applicants might take up the occupation of seamen, but with *ex parte* termination of the plaintiffs' existing means of livelihood with no "notice prior to the initial determination by the Commandant that they could no longer be employed on board ships" (227 F. 2d 708 at 716), and with "no opportunity to participate in the process of examining the facts which may have a bearing upon this initial determination" (*id.* at 711). Thereafter, each plaintiff was sent an identical form letter purportedly informing him of the "general basis" for the denial of clearance; at subsequent hearings in the cases of those plaintiffs finally denied clearance, the examiner declined to address any questions to one of the plaintiffs; and in no proceedings did witnesses appear against the plaintiffs (112 F. Supp. 433). It is further apparent from the various court opinions in the case that at no time were the plaintiffs furnished with information substantially more specific than that the denial of clearance was

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passport: his inability to obtain employment in his chosen field in the United States. The denial of a passport has not destroyed petitioner's livelihood but at most has prevented him from taking advantage of one opportunity to remedy the unfavorable employment situation in which he now finds himself.

"based on the belief that you are affiliated with, or sympathetic to an organization, association, group, or combination of persons subversive or disloyal to the Government of the United States," although in at least one instance the Communist Party was specifically named (112 F. Supp. at 439).

In ruling that these procedures were deficient under the Fifth Amendment, the Court of Appeals for the Ninth Circuit made clear the particular aspects of the procedures to which it took exception. The District Court had entered a decree permitting the plaintiffs to demand a bill of particulars but specifying that "such bill of particulars need not set forth the source of such data, nor disclose the data with such specificity that the identity of *any* informers who have supplied such allegations or data will necessarily be disclosed to the said seaman or other persons" (227 F. 2d at 711; emphasis added). Subsequent to this decree and prior to the appeal, the Coast Guard amended its regulations to bring them into substantial conformance with the decree.[34] The Court of Appeals ruled that under this decree and the resulting regulations the plaintiffs would not be assured of notice sufficient to meet charges against them, specifically contrasting (*id.* at 715, note 11a) the new Coast Guard

[34] "The statement of the basis for the action taken under subparagraph (1) or (2) of this paragraph shall be worded with such specificity as to afford such person an opportunity to marshal evidence in refutation thereof, and otherwise in his behalf. This statement *shall not* be worded with such particularity as to disclose the source of such information or data, nor the identity of *any* person or persons who may have furnished such information or data, to said person or other persons." 227 F. 2d at 711, fn. 5; emphasis added.

regulation with the regulations considered in *National Lawyers Guild* v. *Brownell*, 225 F. 2d 552 (C. A. D. C.), certiorari denied, 351 U. S. 927—regulations providing "for notice, hearings, and a determination upon the record, *except for classified security information*" (225 F. 2d at 556; emphasis added). It is plain that the Ninth Circuit was objecting to the provisions of the Coast Guard regulation which absolutely precluded the disclosure of *all* sources of information and the identity of *all* informants, with no limitation as to the need for such non-disclosure in terms of national security. The true scope of the opinion may be gleaned from the discussion at 227 F. 2d 722, where the court compares its decision with its prior decision in *United States* v. *Gray*, 207 F. 2d 237 (C. A. 9). Indeed, the court made plain the limited nature of its condemnation of the use of confidential information. Its opinion closed with these significant words (227 F. 2d at 723–724; emphasis added):

> * * * we have no occasion to hold whether in subsequent attempts to carry out the objectives of the merchant seamen screening program regulations might be adopted which *in some degree qualify the ordinary right to confrontation and cross-examination of informers.* It is sufficient to say that *as framed and operated* these regulations fall short of furnishing the minimum requirements of due process in respect to notice and opportunity to be heard.

As petitioner has noted, "the Coast Guard has [now] revised its regulations to comport with the court's ruling * * *" (Pet. Br. 29, note 10)—by providing for the withholding of information and sources

only where this is required in the interest of national security. See 21 F. R. 2814; see also *Lester* v. *Parker*, 235 F. 2d 787 (C. A. 9), rehearing denied, 237 F. 2d 698.

In the present case, non-disclosure of information and sources has similarly been limited to cases where revelation would imperil internal security, or the conduct of foreign affairs. Far from refusing to disclose the identity of any informants, the Department of State not only disclosed to petitioner the identity of three informants but produced them as witnesses for purposes of confrontation and cross-examination. *Supra*, pp. 13–17. In this light, *Parker* v. *Lester* is neither in conflict with the decision below nor persuasive on behalf of petitioner.[55]

4. *There are no practical alternatives to the use of undisclosed sources and information in the operation of the travel control program.*—We have stressed that the travel control program authorized by 8 U. S. C. 1185 has the rationale of restricting travel on a limited evidentiary basis—limited both as to the substance of the evidence and its availability to the passport applicant. See, *e. g.*, *supra*, pp. 36–45. If full disclosure and iron-clad proof were required, the program would serve no real purpose. But even if this were not so, as a practical matter, the Secretary could not provide the full confrontation and cross-examination in passport proceedings which petitioner seeks. The only course open to the Secretary would be to abandon his

[55] The summary of the *Parker* case suffices to explain the Government's decision not to petition for certiorari in that case.

attempts to exercise the power and duty given him by Congress and the President to restrict travel in the national interest.

From the example of the present case, we see that the Board of Passport Appeals may be able to induce informants to appear in person to confront the applicant and to subject themselves to cross-examination for his benefit. But the Board could not have required this, since it has no power to subpoena witnesses, nor to coerce testimony if witnesses appear voluntarily (R. 60, 173, 188, 232, 270; see also *Report of the Commission on Government Security* (1957), p. xviii). Cf. *Deviny* v. *Campbell*, 194 F. 2d 876, 880 (C. A. D. C.). No funds for witness fees or travel expenses are available. Except insofar as informants may be willing to pursue the commendable course followed by the Elwyns in this case, the Secretary must therefore rely upon what information he is able to develop from his own investigations, information furnished by other governmental departments, and information submitted by the applicant himself. Moreover, other governmental agencies furnish classified information to the Secretary of State only on condition that it not be disclosed or compromised,[56] as is indicated at pp. 67–68 of the Record. And even if the reports furnished by other agencies were furnished to petitioner, his objections to the hearsay nature of such information would not be overcome unless the other agency's sources could be persuaded to testify.

[56] See Comment, *The Use of Undisclosed Evidence by Government Officials in Administrative and Judicial Proceedings*, 45 Calif. L. Rev. 524, 530.

As for the confidential information which, if disclosed, might prejudice the conduct of our foreign relations, it is unthinkable that the Secretary should be compelled to disclose this. But even if the Secretary were willing to divulge the information, the cross-examination of the informant might well require the recall of our diplomatic and consular representatives—even possibly the ambassador himself—from diplomatic posts abroad.

What petitioner asks, therefore, is that the Court, by reversing the decision below, not only drain 8 U. S. C. 1185 of vitality, but place permanently disabling restrictions upon the Government's power to enforce reasonable travel controls in times of war and emergency. We submit that petitioner's interests are not sufficient to require so grave a result. He has not been subjected to a criminal trial or punishment. He cannot travel to India because his application for a passport was denied, after administrative proceedings with procedural protections for his benefit, on the adequate ground that the Secretary of State had reason to believe that his travel to India was intended to further the Communist movement.

In these circumstances, petitioner was accorded due process of law. He is not entitled to more; he is not entitled to demand that the Secretary of State must act contrary to the national interest by either abandoning travel controls or jeopardizing the Government's intelligence network and its foreign relations.[37]

[37] Petitioner and *amici* both argue as a separate point that the hearing requirements of Section 5 of the Administrative Procedure Act are applicable to passport decisions and have not been complied with (Pet. Br. 44–46; Brief for *Amici*, pp. 32–

IV

THE DENIAL OF A PASSPORT TO PETITIONER DID NOT VIOLATE HIS RIGHTS UNDER THE FIRST AMENDMENT

In the Brief for Respondent in No. 481 we demonstrated that, as a general proposition, First Amendment rights are not violated by the denial of a pass-

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34). Petitioner acknowledges that this question was not raised in the petition (Pet. Br. 3, note 1). Consideration of the question is therefore precluded by Rule 23 (1) (c) of the Rules of this Court. Only recently the Court has said in a similar situation that "the question was not mentioned in the petition for certiorari filed in this Court. Our Rule 23 (1) (c) provides, in pertinent part: 'Only the questions set forth in the petition or fairly comprised therein will be considered by the court.' The question is not proper here. Cf. *Irvine* v. *California*, 347 U. S. 128, 129." *Lawn* v. *United States*, 355 U. S. 339, 363, note 16. In the *Irvine* case, the Court said: "We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition unless we limit the grant * * *. We do not take up the questions * * * because they are improperly presented." 347 U. S. 128, 129–130.

The failure of the court below to rule in petitioner's favor on the basis of this asserted ground was obviously not "plain error" as petitioner contends (Pet. Br. 3, note 1). Numerous litigants in that court have similarly argued that the Administrative Procedure Act provisions apply here; indeed, petitioner raised the issue in the court below by a one-sentence reference to the argument in another case (see Brief for Appellant, C. A. D. C. No. 13717, pp. 49–50). No member of the court has ever thought it necessary even to refer to the argument, whether in a majority or dissenting opinion, despite the fact that if petitioner is correct the constitutional issues below could all have been avoided. The reasons for this are clear. Section 5 applies only to cases "of adjudication *required by statute to be determined on the record after opportunity for an agency hearing*, except to the extent that there is involved * * * (4) the conduct of military, naval, or *foreign affairs functions* * * *" (5 U. S. C. 1004; emphasis added). Section 5 thus does not apply by its terms, since there is no statutory hearing re-

port on grounds related to Communist activity (pp. 97–100). Those arguments are applicable to the passport denial here, based upon the Secretary's "reason to believe, on the balance of all the evidence, that [petitioner] is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement" (R. 278, *supra*, p. 22). The language of this finding so obviously shows that the denial of the passport is designed to prevent the evils of future conduct and not to "punish" petitioner for past conduct as to require no discussion of petitioner's *ex post facto* and "bill of attainder" arguments. The same arguments are answered in full in the Brief for the Respondent in No. 481 at pp. 81–85. In Point II in this brief, we have also demonstrated that the consideration of petitioner's associations did not violate his First Amendment rights (*supra*, pp. 62–63).

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quirement with respect to passport issuance, as the Senate Committee noted (Senate Judiciary Committee Print, June 1945, Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 12): "Since [the passport and visa] functions are not required by statute to be made upon administrative hearing, sections 5, 7, and 8 relating to adjudications, hearings, and decisions are inapplicable." The congressional intent that there be no full evidentiary proceedings in the operation of the travel control program (*supra*, pp. 35–42) is also persuasive. Moreover, the foreign affairs exception would appear to apply to passport decisions. See Attorney General's Manual on the Administrative Procedure Act (1947), p. 27. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, does not aid petitioner (see Pet. Br. 44). There, the Court was dealing with a statute into which a hearing requirement had been read by the Court in previous cases decided prior to the enactment of the Administrative Procedure Act and prior to the reenactment of the deportation statute in question. See 339 U. S. at 48, fn. 30.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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MARCH 1958.

APPENDIX

The pertinent portions of the regulations issued by the Secretary of State, as found in Part 51 of Title 22 of the 1956 Supplement to the Code of Federal Regulations, are as follows:

(*a*) From Departmental Regulation No. 108.162, August 28, 1952, 17 F. R. 8013,[1] as amended by Departmental Regulation No. 108.276, January 10, 1956, 21 F. R. 336:

§ 51.135. *Limitations on issuance of passports to persons supporting Communist movement.*

In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to

[1] The preamble to this regulation reads as follows:

Pursuant to the authority vested in me by paragraph 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F. R. 681; 22 CFR 51.77), under authority of section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887; 22 U. S. C. 211 (a)), the regulations issued on March 31, 1938 (Departmental Order 749) as amended (22 CFR 51.101 to 51.134) are hereby further amended by the addition of new sections 51.135 to 51.143 as follows: * * *

act in furtherance of the interests and under the discipline of the Communist party;

(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;

(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement.

§ 51.136.[2] *Limitations on issuance of passports to certain other persons.*

In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States.

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[2] Prior to the amendment of January 10, 1956, this section read as follows:

§ 51.136. *Limitations on issuance of passports to persons likely to violate laws of the United States*

In order to promote the national interest by assuring that the conduct of foreign relations shall be free from unlawful interference, no passport, except one limited for direct and immediate return to the United States, shall be issued to

§ 51.137. *Notification to persons whose passport application is tentatively disapproved.*

A person whose passport application is tentatively disapproved under the provisions of § 51.135 or § 51.136 will be notified in writing of the tentative refusal, and of the reasons on which it is based, as specifically as in the judgment of the Department of State security considerations permit. He shall be entitled, upon request, and before such refusal becomes final, to present his case and all relevant information informally to the Passport Division. He shall be entitled to appear in person before a hearing officer of the Passport Division, and to be represented by counsel. He will, upon request, confirm his oral statements in an affidavit for the record. After the applicant has presented his case, the Passport Division will review the record, and after consultation with other interested offices, advise the applicant of the decision. If the decision is adverse, such advice will be in writing and shall state the reasons on which the decision is based as specifically as within the judgment of the Department of State security limitations permit. Such advice shall also inform the applicant of his right to appeal under § 51.138.

§ 51.138. *Appeal by passport applicant.*—In the event of a decision adverse to the applicant, he shall be entitled to appeal his case to the Board of Passport Appeals provided for in § 51.139.

§ 51.139. *Creation and functions of Board of Passport Appeals.*—There is hereby established within the Department of State a Board of

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persons as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities while abroad which would violate the laws of the United States, or which if carried on in the United States would violate such laws designed to protect the security of the United States.

Passport Appeals, hereinafter referred to as the Board, composed of not less than three officers of the Department to be designated by the Secretary of State. The Board shall act on all appeals under § 51.138. The Board shall adopt and make public its own rules of procedure, to be approved by the Secretary, which shall provide that its duties in any case may be performed by a panel of not less than three members acting by majority determination. The rules shall accord applicant the right to a hearing and to be represented by counsel, and shall accord applicant and each witness the right to inspect the transcript of his own testimony.

§ 51.140. *Duty of Board to advise Secretary of State on action for disposition of appealed cases.*—It shall be the duty of the Board, on all the evidence, to advise the Secretary of the action it finds necessary and proper to the disposition of cases appealed to it, and to this end the Board may first call for clarification of the record, further investigation, or other action consistent with its duties.

§ 51.141. *Bases for findings of fact by Board [of Passport Appeals].*

(a) In making or reviewing findings of fact, the Board, and all others with responsibility for so doing under §§ 51.135 to 51.143, shall be convinced by a preponderance of the evidence, as would a trial court in a civil case.

(b) Consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line will suffice, prima facie, to support a finding under § 51.135 (b).

§ 51.142. *Oath or affirmation by applicant as to membership in Communist Party.*

At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to sub-

scribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.

§ 51.143.[3] *Applicability of §§ 51.137–51.142.*

Except for action taken by reason of noncitizenship or geographical limitations of general applicability necessitated by foreign policy considerations, the provisions of §§ 51.137–51.142 shall apply in any case where the person affected takes issue with the action of the Secretary in granting, refusing, restricting, withdrawing, canceling, revoking, extending, renewing, or in any other fashion or degree affecting the ability of such person to receive or use a passport.

(*b*) From Departmental Regulation No. 108.210, January 4, 1954, 19 F. R. 161:

RULES OF THE BOARD OF PASSPORT APPEALS

§ 51.151 *Organization of Board.*—The Secretary of State shall appoint a Board of Passport Appeals consisting of three or more members, one of whom shall be designated by the Secre-

[3] Prior to the amendment of January 10, 1956, this section read as follows:

§ 51.143 *Applicability of § 51.135 to § 51.142.*

When the standards set out in § 51.135 or § 51.136 are made relevant by the facts of a particular case to the exercise of the discretion of the Secretary under § 51.75, the standards in §§ 51.135 and 51.136 shall be applied and the procedural safeguards of §§ 51.137 to 51.142 shall be followed in any case where the person affected takes issue with the action of the Department in granting, refusing, restricting, withdrawing, cancelling, revoking, extending, renewing, or in any other fashion or degree affecting the ability of a person to use a passport through action taken in a particular case.

tary as Chairman. The Chairman shall assure that there is assigned to hear the appeal of any applicant a panel of not less than three members including himself or his designee as presiding officer, which number shall constitute a quorum.

§ 51.152 *Decisions of the Board.*—Decisions shall be by majority vote. Voting may be either in open or closed session on any question except recommendations under § 51.140, which shall be in closed session. Decisions under § 51.140 shall be in writing and shall be signed by all participating members of the Board.

§ 51.153 *Counsel to the Board.*—A Counsel, to be designated by the Secretary of State, shall be responsible to the Board for the scheduling and presentation of cases, aid in legal and procedural matters, information to the applicant as to his procedural rights before the Board, maintenance of records and such other duties as the Board or the Chairman, on its behalf, may determine.

§ 51.154 *Examiner.*—The Board may, within its discretion, appoint an examiner in any case, who may, with respect to such case, be vested with any or all authority vested in the Board or its presiding officer, subject to review and final decision by the Board, but an applicant shall not be denied an opportunity for a hearing before the Board unless he expressly waives it.

§ 51.155 *Chairman.*—The Chairman, or his designee, shall preside at all hearings of the Board, and shall be empowered in all respects to regulate the course of the hearings and pass upon all issues relating thereto. The Chairman, or his designee, shall be empowered to administer oaths and affirmations.

§ 51.156 *Prior administrative remedies.*—It is required that prior to petitioning for an appeal, an applicant shall (a) exhaust the administrative remedies available in the Passport Office, as set out in § 51.137, and (b) comply

with the provisions of § 51.142, as a part of his application, if deemed necessary by the Passport Office.

§ 51.157 *Petition.*—An applicant desiring to take an appeal shall, within thirty calendar days after receipt of the advice of adverse decision by the Passport Office file with the Board a written petition under oath or affirmation which shall, in plain and concise language, refute or explain the reasons stated by the Passport Office for its decision.

§ 51.158 *Delivery of papers.*—Petitions or other papers for the attention of the Board may be delivered personally, by registered mail, or by leaving a copy at the offices of the Board at the address to be stated in the advice of adverse action furnished applicant by the Passport Office.

§ 51.159 *Notice of hearing.*—Applicant shall receive not less than five calendar days notice in writing of the scheduled date and place of hearing which shall be set for a time as soon as possible after receipt by the Board of applicant's petition.

§ 51.160 *Appearance.*—Any party to any proceedings before the Board may appear in person, or by or with his attorney, who must possess the requisite qualifications, as hereinafter set forth, to practice before the Board.

§ 51.161. *Applicant's attorney.*—(a) Attorneys at law in good standing who are admitted to practice before the Federal courts or before the courts of any State or Territory of the United States may practice before the Board.

(b) No officer or employee of the Department of State whose official duties have, in fact, included participation in the investigation, preparation, presentation, decision or review of cases of the class within the competence of the Board of Passport Appeals shall, within two (2) years after the termination of such duties appear as attorney in behalf of an applicant in any case

of such nature, nor shall any one appear as such attorney in a case of such class if in the course of prior government service he has dealt with any aspects of the applicant's activities relevant to a determination of that case.

§ 51.162 *Supplementary information to applicant.*—The purpose of the hearing is to permit applicant to present all information relevant and material to the decision in his case. Applicant may, at the time of filing his petition, address a request in writing to the Board for such additional information or explanation as may be necessary to the preparation of his case. In conformity with the relevant laws and regulations, the Board shall pass promptly and finally upon all such requests and shall advise applicant of its decision. The Board shall take whatever action it deems necessary to insure the applicant of a full and fair consideration of his case.

§ 51.163 *Hearings.*—The Passport file and any other pertinent Government files shall be considered as part of the evidence in each case without testimony or other formality as to admissibility. Such files may not be examined by the applicant, except the applicant may examine his application or any paper which he has submitted in connection with his application or appeal. The applicant may appear and testify in his own behalf, be represented by counsel subject to the provisions of § 51.161, present witnesses and offer other evidence in his own behalf. The applicant and all witnesses may be cross-examined by any member of the Board or its counsel. If any witness whom the applicant wishes to call is unable to appear personally, the Board may, in its discretion, accept an affidavit by him or order evidence to be taken by deposition. Such depositions may be taken before any person designated by the Board and such designee is hereby authorized to administer oaths or affirmations for the purpose

of the depositions. The Board shall conduct the hearing proceedings in such manner as to protect from disclosure information affecting the national security or tending to disclose or compromise investigative sources or methods.

§ 51.164 *Admissibility.*—The Board and the applicant may introduce such evidence as the Board deems proper. Formal rules of evidence shall not apply, but reasonable restrictions shall be imposed as to the relevancy, competency, and materiality of evidence presented to the Passport Office's stated reasons for its decision and/or to the application of § 51.135 or § 51.136 to applicant's case.

§ 51.165 *Argumentation.*—All argumentation shall be directed to the application of the passport regulations to the facts of the particular case. The Board will permit no oral argument or motions relative to the legality or propriety of the hearing or other procedures of the Board. Submission of such argument or motions will be confined to the filing of written briefs, objections, or motions to be made a part of the record. The Board will not undertake to consider any such motion or contention.

§ 51.166 *Privacy of hearings.*—Hearings shall be private. There shall be present at the hearing only the members of the Board, Board's Counsel, official stenographers, Departmental employees concerned, the applicant, his counsel, and the witnesses. Witnesses shall be present at the hearing only while actually giving testimony.

§ 51.167 *Misbehavior before Board.*—If, in the course of a hearing before the Board, an applicant or attorney is guilty of misbehavior, he may be excluded from further participation in the hearing. In addition, he may be excluded from participation in any other case before the Board.

§ 51.168 *Transcript of hearings.*—A complete verbatim stenographic transcript shall be

made of hearings by qualified reporters, and the transcript shall constitute a permanent part of the record. Upon request, the applicant and each witness shall have the right to inspect the transcript of his own testimony.

§ 51.169 *Notice of decision.*—The Board shall communicate the action recommended under § 51.140 on all cases appealed to it, to the Secretary of State. The decision of the Secretary of State shall be notified in writing to the applicant. Such notice shall be given the applicant as promptly as possible after his hearing before the Board.

§ 51.170 *Probative value of evidence.*—In determining whether there is a preponderance of evidence supporting the denial of a passport the Board shall consider the entire record, including the transcript of the hearing and such confidential information as it may have in its possession. The Board shall take into consideration the inability of the applicant to meet information of which he has not been advised, specifically or in detail, or to attack the creditability of confidential informants.

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